SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 329.

FEDERAL TRADE COMMISSION, PETITIONER,

vs.

BEECH-NUT PACKING COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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A In the United States Circuit Court of Appeals, for the Second Circuit.

BEECH-NUT PACKING COMPANY, A CORPORATION, petitioner,
vs.
FEDERAL TRADE COMMISSION, RESPONDENT.

Original petition to review order of Federal Trade Commission.

Charles Wesley Dunn, attorney for petitioner, 32 Liberty St., Borough of Manhattan, New York, N. Y.

1 In the United States Circuit Court of Appeals, for the Second Circuit, ss.

BEECH-NUT PACKING COMPANY, A CORPORATION, petitioner,
vs.
FEDERAL TRADE COMMISSION, RESPONDENT.

PETITION FOR REVIEW.

To the honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

Your petitioner, Beech-Nut Packing Company, respectfully represents:

I. That it is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, having its principal factory, office, and place of business located in the town of Canajoharie, State of New York, within the jurisdiction of the United States Circuit Court of Appeals for the Second Circuit.

II. That heretofore and on or about the 15th day of April, 1918, the Federal Trade Commission filed and issued its complaint against your petitioner, alleging the use of unfair methods of competition in interstate commerce in violation of the provisions of section 5 of an act of Congress approved September 26, 1913, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," in the words and figures following, to wit:

2 *Complaint.*

United States of America—Before Federal Trade Commission, ss.

At a regular session of the Federal Trade Commission held at its office in the city of Washington, D. C., on the 15th day of April, A. D. 1918.

Present: William J. Harris, chairman; William B. Colver, J. Franklin Fort, Victor Murdock, commissioners.

FEDERAL TRADE COMMISSION *vs.* BEECH-NUT PACKING COMPANY.	Docket No. 88. Complaint in the matter of the alleged violation of section 5 of an act of Congress approved September 26, 1914.

The Federal Trade Commission, having reason to believe from a preliminary investigation made by it, that the Beech-Nut Packing Company, hereinafter referred to as respondent, has been and is, using unfair methods of competition in interstate commerce in violation of the provisions of section 5 of an act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," and it appearing that a proceeding by it in respect thereof would be to the interest of the public, issues this complaint, stating its charges in that respect, on information and belief as follows:

Paragraph One: That the respondent, Beech-Nut Packing
3 Company, is now and was at all times hereinafter mention, a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, having its principal factory, office, and place of business located at the town of Canajoharie, State of New York, now and for more than two years last past engaged in the manufacture and sale of chewing gum and food products among the several States of the United States, the Territories thereof, and the District of Columbia, in direct competition with other persons, firms, copartnerships, and corporations similarly engaged.

Paragraph Two: That the respondent, Beech-Nut Packing Company, in the conduct of its business, manufactures such chewing gum so sold by it, in its factory located at the town of Canajoharie, State of New York, and purchases and enters into contracts of purchase for the necessary component materials neeeded therefor, in different States and Territories of the United States, causing the same to be transported to its factory where they are made into the finished products, sold and shipped to the purchasers thereof; that after such products are so manufactured, they are continuously moved to, from, and among other States and Territories of the United States, the District of Columbia, and foreign countries, and there is continuously, and has been at all times hereinafter mentioned, a constant current of trade and commerce in the said products between and among the various States and Territories of the United States and the District of Columbia, and especially to and through the town of Canajoharie, State of New York, and therefrom to and through other States and Territories of the United States and the District of Columbia.

4 Paragraph Three: That with the intent, purpose, and effect of stifling and suppressing competition in the manufacture, marketing, and sale of its products in the course of such commerce,

and as a means of securing the trade of dealers and obtaining their aid and cooperation in enlarging the sale of its products, and with the purpose of eliminating competition in the selling price among the various dealers in its products and thereby depriving the dealers of their freedom to sell such products at prices which, in their judgment, would be warranted by trade conditions and for other purposes, the respondent has fixed and maintained certain specified standard prices at which the products manufactured and sold by it shall be resold by the purchaser thereof, and requires its purchasers to agree to maintain or resell such products at such standard selling prices; and that for the purpose of maintaining said standard resale prices and of inducing and compelling its customers to maintain and keep such standard prices, the respondent, for more than three months last past, has refused and is still now refusing to sell its products to customers or dealers who will not agree to maintain such specified standard resale prices, or who do not resell such products at the specified standard selling prices so fixed and determined by the respondent as aforesaid.

Wherefore, notice is hereby given you, Beech-Nut Packing Company, that the charges of this complaint will be heard by the Federal Trade Commission at its office in the Federal Trade Commission Building, 15th and K Streets, at the city of Washington, D. C., on the 6th day of June, 1918, at 10.30 o'clock in the forenoon of the said day, or as soon thereafter as the same may be reached, at which time and place you shall have the right to appear and show cause why an order should not be entered by the Federal Trade Commission requiring you to cease and desist from the violations of law charged in this complaint.

You will take notice that within thirty (30) days after the service of this complaint, you are required to file with the Federal Trade Commission, an answer in conformity with Rule III of the Rules of Practice before the Commission.

In witness whereof, the Federal Trade Commission has caused this complaint to be issued, signed by its secretary, and its official seal to be affixed hereto, at the city of Washington, D. C., this 15th day of April, A. D. 1918.

By the Commission.

(Signed) L. L. BRACKEN,
Secretary.

(Signed) JOHN WALSH,
Chief Counsel.

III. That thereupon your petitioner filed and exhibited its answer to said complaint, in the words and figures following, to wit:

6 *Answer to complaint.*

United States of America—Federal Trade Commission.

FEDERAL TRADE COMMISSION
vs.
BEECH-NUT PACKING COMPANY. } Docket No. 88.

And now comes the Beech-Nut Packing Company, the respondent herein, and for answer to the complaint of alleged violation of section 5 of the act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," says:

Paragraph One: That it admits the allegations contained in paragraph one of said complaint.

Paragraph Two: That it admits the allegations contained in paragraph two of said complaint.

Paragraph Three: That it denies each and every allegation in paragraph three of said complaint, excepting those hereinafter specifically admitted in this answer. It denies that it has entered into any agreement with any purchaser of its products fixing any price at which such products shall be resold or requiring any purchaser to maintain any resale price or has in any way qualified the title of such purchaser to any such products or the freedom of such purchasers to resell such products at any price, by any restrictive agreement whatever. Respondent admits that, for more than
7 three months last past, it has suggested selling prices to the immediate purchasers of its products, for use by such purchasers in the resale of said products, which prices were fair and reasonable, in all respects. Respondent further admits that, during said period, it has refused to continue to sell its products to dealers who did not resell such products at the fair and reasonable prices suggested by it.

Paragraph Four: That the acts admitted in paragraph three of this answer do not constitute a violation of section 5 of the said act of Congress approved September 26, 1914.

Paragraph Five: That the acts admitted in paragraph three of this answer do not constitute an offense under the laws of the United States.

Wherefore this respondent prays that said complaint be dismissed.

BEECH-NUT PACKING COMPANY,
By BARTLETT ARKELL, *President.*
CHARLES WESLEY DUNN,
Attorney for Respondent.
Post-office address, 32 Liberty Street, New York, N. Y.

IV. That thereupon a stipulation amending paragraphs two and three of said complaint and a further stipulation that said answer of the respondent, the Beech-Nut Packing Company, shall stand as

the answer of respondent, the Beech-Nut Packing Company, to said complaint as thereby amended, were entered into by and between the attorneys for the respective parties hereto and filed, in the words and figures following, to wit:

8 *Stipulation amending complaint.*

United States of America—Before Federal Trade Commission, ss.

FEDERAL TRADE COMMISSION
v.
BEECH-NUT PACKING COMPANY. } Docket No. 88.

It is hereby stipulated by and between the attorneys for the respective parties hereto that the complaint herein be deemed amended by inserting in paragraph two thereof, after the words "chewing gum," the words "and food products," and that paragraph three of the complaint be, and the same is hereby, amended so as to read as follows:

"Paragraph Three: That the respondent, the Beech-Nut Packing Company, has adopted and enforced a system of fixing and maintaining certain specified standard prices at which its said chewing gum and food products shall be resold by purchasers thereof, including jobbers, wholesalers, and retailers, with the purpose and effect of securing the trade of such jobbers, wholesalers, and retailers and of enlisting their active support and cooperation in enlarging the sale of respondent's said products to the prejudice of competitors of respondent who do not require and enforce the maintenance of resale prices on their products, and with the purpose and effect of eliminating competition in prices among all jobbers, wholesalers and retailers respectively engaged in handling the products manufactured by respondent, thereby depriving such distributors of their right to sell, and preventing them from selling,

9 said products at such prices as they may deem to be and as are adequate and warranted by their respective selling costs and efficiency, and with various other effects, and that respondent as a means of making effective its said system of resale prices as aforesaid and of inducing and compelling its customers and the dealer customers of its customers to maintain such resale prices, has for more than two years last past: (a) Made it generally known to said jobbers, wholesalers, and retailers, respectively, that it required and insisted that they should sell said products at the resale prices so fixed by respondent and refuse to sell the same to jobbers, wholesalers, or retailers not maintaining such prices; (b) threatened to, and did, refuse to sell to all jobbers, wholesalers, and retailers who failed to maintain the resale prices so fixed by respondent, or who sold to other distributors who failed to maintain such prices; (c) induced or compelled said jobbers, wholesalers, and retailers, by divers other means, not only to maintain its resale prices fixed as

aforesaid but also to discontinue selling said products to other jobbers, wholesalers, and retailers who did not maintain such resale prices; (d) caused the diversion of retailer's orders away from jobbers and wholesalers who did not maintain such resale prices so fixed by respondent or who had resold its products to other jobbers, wholesalers, or retailers who had failed to maintain such resale prices, and caused such orders to be given to other jobbers and wholesalers who had maintained such resale prices and/or had refused to supply other jobbers, wholesalers, and retailers failing to maintain such prices; (e) solicited and secured the cooperation of wholesalers, jobbers, and retailers in reporting price cutters, all in
10 pursuance of its efforts to ascertain the names of all distributors of its products who had failed to maintain the resale prices fixed by it, as aforesaid, and/or who had resold to other jobbers, wholesalers, and retailers failing to maintain such prices; (f) entered in card records kept by it the names of all dealers reported to it, either in this or other ways, as not maintaining said resale prices or as selling to other distributors not maintaining such prices, and has taken various measures to prevent all such dealers from obtaining further shipments of its products from any source until it has received from them declarations, promises, assurances, statements, or other similar expressions, to the effect that in the future such dealers intend to and will sell such products at the resale prices fixed by respondent and will refrain from selling the same to other jobbers, wholesalers, and retailers failing to maintain such prices; (g) employed various other means and methods for the enforcement of its said system of maintaining resale prices."

And it is further stipulated that the answer of the respondent heretofore filed herein shall stand as respondent's answer to said complaint as hreeby amended.

EDWARD L. SMITH,
Acting Chief Counsel for Federal Trade Commission.

CHARLES WESLEY DUNN,
Attorney for Respondent Beechnut Packing Company.

Dated this day of April, 1919.

V. That thereupon a stipulation of facts was entered into by and between the attorneys for the respective parties hereto and filed, in the words and figures following, to wit:

11 *Stipulation of facts.*

United States of America—Before Federal Trade Commission, ss:

At a regular session of the Federal Trade Commission held at its office in the city of Washington, D. C., on the day of April, A. D. 1919.

Present: William B. Colver, chairman; John Franklin Fort, Victor Murdock, Huston Thompson, commissioners.

FEDERAL TRADE COMMISSION
vs.
BEECH-NUT PACKING COMPANY.
} Docket No. 88.

Agreed statement of facts.

The Federal Trade Commission having issued and served its complaint herein, and respondent, Beech-Nut Packing Company, a corporation, having entered its appearance by Charley Wesley Dunn, attorney, and having filed its answer admitting certain allegations of said complaint and denying certain others, and both parties to this proceeding being desirous of expediting the disposition thereof, it is hereby stipulated and agreed, subject to the approval of the Commission, that the following statement of facts shall be taken by the Commission in lieu of testimony herein and that the Commission may forthwith proceed upon such agreed statement of
12 facts to make and enter its report and findings as to the facts, its conclusions of law, and its order disposing of this proceeding:

1. That the respondent, Beech-Nut Packing Company, is a corporation organized and doing business under the laws of the State of New York, and having its principal office and place of business in the town of Canajoharie, State of New York, and is now, and for more than four years last past, has been engaged in the business of manufacturing and selling chewing gum and food products throughout the States of the United States, the Territories thereof, and the District of Columbia, in direct competition with other persons, copartnerships, and corporations similarly engaged.

2. That in the conduct of its business respondent purchases the component parts of the chewing gum and food products in the various States of the United States, the Territories thereof, and in foreign countries, and has the same transported through said other States and Territories and foreign countries, in and to the town of Canajoharie, and other points in the State of New York, and there said respondent manufactures and puts up and from there sells and ships to the purchasers thereof in the different States and Territories of the United States and the District of Columbia and in foreign countries, the said chewing gum and food products, and there is continuously and has been, at all times herein mentioned, a constant current of trade and commerce in said chewing gum and food products between and among the several States, Territories, and District of Columbia of the United States, and foreign countries.
13 3. That the quantity of such products so manufactured, sold and distributed by respondent, has been and is substantial, and forms an important item of commerce among the several States, Territories and District of Columbia of the United States, and with foreign countries.

4. That respondent customarily markets its products principally through jobbers and wholesalers in the grocery, drug, candy and tobacco lines, who in turn resell to retailers in these lines, all of which

wholesale and retail dealers are selected as desirable customers for the reason that they are known or believed to be (a) of good credit standing; (b) willing to resell at the resale prices suggested by respondent and do resell at such prices, as hereinafter set forth; (c) willing to refuse to sell and do refuse to sell to jobbers, wholesalers and retailers who do not resell at the resale prices suggested by respondent, and who do not sell to such jobbers, wholesalers and retailers as also hereinafter set forth; (d) good and satisfactory merchandisers in other respects.

Such jobbers, wholesalers and retailers are designated by the respondent as "selected" or "desirable" dealers. Respondent also sells "direct" in a few instances to certain large retailers who are selected on the same basis as the aforesaid jobbers, wholesalers and retailers. The total number of such dealers handling the products of respondent includes the greater proportion of the jobbers, wholesalers and retailers, respectively, in the grocery trade and a large proportion of the jobbers, wholesalers and retailers in the drug, candy and tobacco trades, respectively, throughout the United States.

14 5. That respondent, in the sale and distribution of its products, has adopted and maintained, and still maintains, a policy known as the "Beech-Nut policy," and requests the co-operation therein of all dealers selling the products manufactured by it, dealing with each customer separately. Concerning this policy, respondent made a statement on or about February 13, 1916, in a circular letter sent to all jobbers handling "Beech-Nut" products, copy of which letter follows:

"FEBRUARY 13, 1916.

Subject—The Beech-Nut policy.

To jobbers:

For years we have been trying to have our jobbing and dealer friends understand the Beech-Nut merchandising policy. In a word it is this:

First: To produce products that are full value, unequaled as to character and flavor—manufactured under ideal conditions by intelligent, well paid employees.

Second: To provide a fair profit for those who distribute Beech-Nut products.

Third: To provide, as far as we legally may, such protection as will insure to Beech-Nut distributors the full profit to which they are entitled for their efforts.

We feel we are getting more and more co-operation from those who understand the Beech-Nut policy and we wish to emphasize it to all who are anxious to reap full return for their labor.

Now if the Beech-Nut policy is the right one we want your continued and enthusiastic co-operation and we stand ready to see
15 that you get the profit which the distribution of Beech-Nut Products provides.

Can anything be fairer?

Yours, very truly, BEECH-NUT PACKING COMPANY."

In order to carry out said Beech-Nut policy and to secure such co-operation respondent

(a) Issues circulars, price lists, and letters to the trade generally, showing suggested uniform resale prices, both wholesale and retail, to be charged for Beech-Nut products.

(b) Requests and insists that the aforesaid selected jobbers, wholesalers, and retailers resell only at the suggested resale prices.

(c) Requests and insists that the aforesaid selected jobbers, wholesalers, and retailers sell only to such other jobbers, wholesalers, and retailers as have been and are willing to resell and do resell at the prices so suggested by the respondent; and requests and insists that such jobbers, wholesalers, and retailers discontinue selling to other jobbers, wholesalers, and retailers who fail to resell at the prices so suggested by respondent.

(d) Makes it known broadcast to such selected jobbers, wholesalers, and retailers, whether sold "direct" or not, that if they, or any of them, fail to sell at the resale prices suggested by the respondent as aforesaid, respondent will absolutely refuse to sell further supplies of its products to them, or any of them, and will also absolutely refuse to sell any jobbers, wholesalers, and retailers whatsoever who sell to other jobbers, wholesalers, and retailers failing to resell at the prices suggested by respondent.

16 6. That respondent, in the carrying out of said policy:

(a) Has within the time aforementioned refused and does refuse to sell its products to practically all such jobbers, wholesalers, and retailers as do not resell at the prices so suggested by the respondent;

(b) Has within the time aforementioned refused, and does refuse, to sell to practically all such jobbers, wholesalers, and retailers reselling to other jobbers, wholesalers, and retailers who have failed to resell at the prices so suggested by the respondent;

(c) Has within the time aforementioned refused, and does refuse, to sell to practically all so-called mail-order houses engaged in interstate commerce, on the ground that such mail-order houses frequently sell at cut prices, and has within the time aforementioned refused and does refuse to sell to practically all jobbers, wholesalers, and retailers who sell its products to such mail-order houses;

(d) Has within the time aforementioned refused, and does refuse, to sell to practically all so-called price cutters;

(e) Has maintained within the time aforementioned, and does maintain, a large force of so-called specialty salesmen or representatives who call upon the retail trade and solicit orders therefrom to be filled through jobbers and wholesalers, which orders are commonly known in the trade as "turnover orders"; that respondent's salesmen, under its instructions, have within the time aforementioned

17 refused, and do refuse, to accept any such turnover orders to be filled through jobbers and wholesalers who themselves sell or have sold at less than the suggested resale prices or sell or have sold to jobbers, wholesalers, and retailers who sell or have sold at less than

such suggested resale prices; and in such cases have requested such retailers to name other jobbers;

(f) Has within the time aforementioned reinstated and does reinstate as distributors of its products, jobbers, wholesalers, and retailers previously cut off or withdrawn from the list of selected jobbers, wholesalers, and retailers, for failure to resell at the prices suggested by the respondent and/or for selling to distributors who do not maintain such suggested resale prices, upon the basis of declarations, assurances, statements, promises and similar expressions, as the case may be, by said distributors, respectively, which satisfy the respondent that such distributors will thereafter resell at the prices suggested by the respondent and/or will refuse to sell to distributors who do not maintain such suggested resale prices;

(g) Has within theh time aforementioned added and does add to its list of new distributors, concerns reported by its representatives as declaring that they intend to and will resell at the prices suggested by the respondent, and/or will refuse to sell to distributors who do not maintain such suggested resale prices;

(h) Has within the time aforementioned utilized a system of key numbers or symbols stamped or marked upon the cases containing "Beech-Nut Brand" products, thus enabling the respondent,
18 for any purpose whatsoever, to ascertain the identity of the distributors from whom such products were purchased; and that repeatedly, within the time aforementioned, when instances of price cutting have been reported to respondent by the selected wholesalers and retailers, or ascertained in other ways, its salesmen and representatives have been instructed by respondent to investigate, and that in pursuance of these instructions salesmen and representatives of respondent have by means of these key numbers or symbols traced the price cutters from whom the goods have been obtained and have thus ascertained the identity of such price cutters, and have also thus traced and ascertained the identity of distributors from whom price cutters have purchased "Beech-Nut Brand" products; and have thereafter refused to supply all such dealers with its products, whether such dealers were themselves cutting the suggested resale prices or were selling to dealers cutting the suggested resale prices.

(i) Has within the time aforementioned maintained and does maintain card records containing the names of thousands of jobbing, wholesale and retail distributors, including the aforesaid selected distributors, and in furtherance of its refusals to sell goods either to distributors selling at less than the suggested resale prices or to distributors selling to other distributors selling at less than the suggested resale prices, has listed upon these cards bearing the names of such distributors the words "Undesirable—Price Cutters," "Do Not Sell," or "D. N. S." the abbreviation for "Do Not Sell," or expressions of a like character, to indicate that the particular distrib-
19 utor was not, in the future, to be supplied with respondent's goods on account of failure to maintain the aforesaid suggested

resale prices or on account of failure to discontinue selling to dealers failing to maintain such suggested resale prices. When respondent has received declarations, assurances, statements, promises, and similar expressions, as the case may be, by said distributors, respectively, which satisfy the respondent that such distributors will resell at the prices suggested by respondent, and/or discontinue selling to distributors failing to maintain the resale prices suggested by respondent, said respondent has issued instructions to "Clear the record," or directions of similar import, notation of which is made on the cards, and has thereafter permitted shipments of its products to be made to such distributors; and such distributors to whom shipments are thus allowed to go forward constitute the respondent's list of so-called "selected" jobbers, wholesalers, and retailers, and no distributor is thus listed on such card records as one to whom goods are allowed to go forward who fails to maintain the resale prices suggested by respondent or sells to distributors failing to resell at such suggested prices; and when a jobber, wholesaler, or retailer is reported as failing to maintain the suggested resale prices, and/or as selling to distributors who fail to maintain such suggested retail prices, and has been entered in the card records as one to whom shipments should not go forward, respondent notifies those jobbers, wholesalers, and retailers who supply said distributor of this fact, and also notifies its specialty salesman, and gives similar notices to said jobbers, wholesalers, and retailers and so its specialty salesmen when reinstatements are made in its said list of "selected" jobbers, wholesalers, and retailers.

7. That individual jobbers and wholesale dealers, as shown by their letters, have made statements to the effect that they will support respondent and co-operate with it in its selling policy and that they prefer to deal with respondent and will push its products on account of its refusal to supply goods to price cutters or to distributors supplying such price cutters; and that jobbers and wholesale dealers generally prefer to handle and push respondent's goods on which there is a constant fixed margin of profit, rather than the goods of manufacturers competing with the respondent who do not suggest resale prices and/or maintain the same by any means whatsoever.

8. That the distributors handling respondent's goods have repeatedly reported to respondent instances of price cutting in their respective localities and in many cases have reported specifically the names of such price cutters and requested respondent to discontinue selling to them or selling to distributors selling to them; and that respondent has approved and furthered such action on the part of distributors handling its products by repeatedly expressing its appreciation of such notification in its letters of reply to such distributors; and has aided and abetted its distributors in such reporting of price cutters by repeatedly requesting its distributors to supply the names of such price cutters; and that upon receiving such reports respondent has instructed its salesmen to investigate,

and when such salesmen have confirmed the reported price cutting, has refused to supply the price cutter with further goods or to supply goods to distributors continuing to sell to such price cutters after notice to that effect.

9. That respondent, in the distribution of its products, sells
21 "Beech-Nut Brand Pure Food Products" through wholesale and retail grocery dealers and its chewing gum and candy principally through wholesale and retail drug, candy, and tobacco dealers, and that the cost of wholesale and retail grocery, drug, candy, and tobacco dealers handling the products manufactured by the respondent, as estimated by respondent's vice president, together with gross and net profit margins allowed such dealers under the suggested resale prices of the respondent, are as set out in the following table:

Table showing the costs of wholesale and retail dealers handling Beech-Nut products in comparison with the gross and net profit margins of such wholesale and retail dealers under respondent's suggested prices.

Class of dealer.	Costs of doing business on gross sales.	Gross profit margins allowed under respondent's suggested resale prices.		Net profit margin allowed under respondent's suggested resale prices.	
		Including cash discount.	Excluding cash discount.	Including cash discount.	Excluding cash discount.
Wholesale:	*Per cent.*	*Per cent.*	*Per cent.*	*Per cent.*	*Per cent.*
Grocery	5- 9	*12-16.5	*10-14.5	3-11.5	1- 9.5
Drug	12-12.5	22	20	10-10.5	8- 8.5
Candy	10-16	22	20	6-12	4-10
Tobacco	5- 9	22	20	13-17	11-15
Retail:					
Grocery	12-20	**24-39	**23-37	4-27	2-25
Drug	25-30	42	40	12-17	10-15
Candy	20-30	42	40	12-22	10-20
Tobacco	20-30	42	40	12-22	10-20

*10 or 12 in L. C. L. lots. 14.5 or 16.5 in C. L. lots.
**Depending on product and quantity purchased.

10. That these divergencies in the cost of doing business of both wholesalers and retailers are due, respectively, (a) to general differences in the character of the business of different types of wholesalers, i. e., grocery, drug, candy, and tobacco, on the one hand, and of different types of retailers, grocery, drug, candy, and to-
22 bacco, on the other; and (b) to individual differences as among the wholesalers of each type, on the one hand, and as among retailers of each type, on the other; in location of establishment, rate of turnover, efficiency of management, selling expenses, including use or non-use of credit, use or non-use of delivery service, etc.; and in numerous other economic factors of a similar character.

11. That respondent constantly urges that wholesale and retail distributors of its products shall take the full profit suggested by

respondent and circulates both wholesale and retail price lists showing suggested resale prices and gross profit margins to the said distributors under said prices.

12. That the merchandising conduct of respondent heretofore defined and as herein involved does not constitute a contract or contracts whereby resale prices are fixed, maintained, and enforced.

13. Nothing herein contained shall preclude the respondent from questioning or reviewing any order of the Commission which may be made herein, the purpose of this stipulation being merely to make an agreed statement of facts.

EDWARD L. SMITH,
Acting Chief Counsel for the Federal Trade Commission.
CHARLES WESLEY DUNN,
Attorney for Respondent, Beechnut Packing Company.

Dated this 11th day of June, 1919.

VI. That thereafter and on or about the 30th day of June, 1919, the Federal Trade Commission did make and file its report and findings as to the facts and conclusions of law, in the words and figures following, to wit:

23 *Report and findings as to the facts and conclusions of law.*

United States of America—Before Federal Trade Commission, ss.

At a regular session of the Federal Trade Commission held at its office in the city of Washington, D. C., on the 30th day of June, A. D. 1919.

Present: William B. Colver, chairman; John Franklin Fort, Victor Murdock, Huston Thompson, commissioners.

FEDERAL TRADE COMMISSION
vs.
BEECH-NUT PACKING COMPANY.
} Docket No. 88.

The Federal Trade Commission, having issued and served its complaint herein, wherein it alleged that it had reason to believe that the above-named respondent, Beech-Nut Packing Company, has been and now is using unfair methods of competition in interstate commerce in violation of the provisions of section 5 of an act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," and that a proceeding by it in respect to such alleged violation would be to the interest of the public, and fully
24 stating its charges in that respect, and the respondent having entered its appearance by Charles Wesley Dunn, its attorney, and having filed its answer, and it having been thereafter duly stipulated between the parties that said complaint shall be deemed amended in certain respects and that respondent's said answer should stand as its answer to said complaint as so amended, and the

attorneys for both parties having duly signed and filed an agreed statement of facts wherein and whereby it was stipulated and agreed that said statement of facts should be taken by the Commission in lieu of testimony herein and that the Commission might forthwith proceed upon such agreed statement of facts to make and enter its report and findings as to the facts, its conclusions of law, and its order disposing of this proceeding; the Commission having duly considered the record and being fully advised in the premises now makes its report and findings as to the facts and conclusions of law.

Findings as to the facts.

Paragraph One: That the respondent, Beech-Nut Packing Company, is a corporation organized and doing business under the laws of the State of New York and having its principal office and place of business in the town of Canajoharie, State of New York, and is now, and for more than four years last past has been engaged in the business of manufacturing and selling chewing gum and food products throughout the States of the United States, the Territories thereof, and the District of Columbia in direct competition with other persons, copartnerships, and corporations similarly engaged.

25 Paragraph Two: That in the conduct of its business respondent purchases the component parts of the chewing gum and food products in the various States of the United States, the Territories thereof, and in foreign countries, and has the same transported through said other States and Territories and foreign countries, in and to the town of Canajoharie, and other points in the State of New York, and there said respondent manufactures and puts up and from there sells and ships to the purchasers thereof in the different States and Territories of the United States and the District of Columbia and in foreign countries, the said chewing gum and food products, and there is continuously and has been at all times herein mentioned, a constant current of trade and commerce in said chewing gum and food products between and among the several States, Territories, and District of Columbia of the United States, and foreign countries.

Paragraph Three: That the quantity of such products so manufactured, sold, and distributed by respondent has been and is substantial and forms an important item of commerce among the several States, Territories and District of Columbia of the United States and with foreign countries.

Paragraph Four: That respondent customarily markets its products principally through jobbers and wholesalers in the grocery, drug, candy, and tobacco lines, who in turn resell to retailers in these lines, all of which wholesale and retail dealers are selected as desirable customers for the reason that they are known or believed

26 to be (a) of good credit standing; (b) willing to resell at the resale prices suggested by respondent and who do resell at such prices, as hereinafter set forth; (c) willing to refuse to sell

and who do refuse to sell to jobbers, wholesalers, and retailers who do not resell at the resale prices suggested by respondent, and who do not sell to such jobbers, wholesalers, and retailers as also hereinafter set forth; (d) good and satisfactory merchandisers in other respects. Such jobbers, wholesalers, and retailers are designated by the respondent as "selected" or "desirable" dealers. Respondent also sells "direct" in a few instances to certain large retailers who are selected on the same basis as the aforesaid jobbers, wholesalers, and retailers. The total number of such dealers handling the products of respondent includes the greater proportion of the jobbers, wholesalers, and retailers, respectively, in the grocery trade and a large proportion of the jobbers, wholesalers, and retailers in the drug, candy, and tobacco trades, respectively, throughout the United States.

Paragraph Five: That respondent, in the sale and distribution of its products, has adopted and maintained, and still maintains, a policy known as the "Beech-Nut policy," and requests the cooperation therein of all dealers selling the products manufactured by it, dealing with each customer separately.

Paragraph Six: That the purpose and intent of the respondent company in this merchandising policy is, among other things,

(a) To provide a profit for all of its so-called selected distributors which was and is the full profit arbitrarily fixed and estab-
27 lished by the respondent according to its system of uniform resale prices, the maintenance of which the respondent requires and enforces upon all of its distributors, both wholesale and retail.

(b) To provide for all its distributors protection in securing such full profit on the products manufactured by respondent.

(c) To obtain the active support and cooperation of all its distributors, both wholesale and retail;

(1) In maintaining its said resale prices and pushing its price-maintained products.

(2) In preventing and eliminating all sales at lower prices than its fixed uniform resale prices.

(3) In preventing wholesale dealers and jobbers from selling its products to retail dealers who sell or have sold at prices lower than the fixed uniform resale prices at which it requires retailers to resell.

Paragraph Seven: In order to carry out said Beech-Nut policy and to secure such cooperation, respondent—

(a) Issues circulars, price lists, and letters to the trade generally showing suggested uniform resale prices, both wholesale and retail, to be charged for Beech-Nut products.

(b) Requests and insists that the aforesaid selected jobbers, wholesalers and retailers resell only at the suggested resale prices.

(c) Requests and insists that the aforesaid selected jobbers, wholesalers and retailers sell only to such other jobbers, whole-
28 salers, and retailers as have been and are willing to resell and do resell at the prices so suggested by the respondent; and requests and insists that such jobbers, wholesalers, and retailers dis-

continue selling to other jobbers, wholesalers, and retailers who fair to resell at the prices so suggested by respondent.

(d) Makes it known broadcast to such selected jobbers, wholesalers, and retailers, whether sold "direct" or not, that if they, or any of them, fail to sell at the resale prices suggested by the respondent as aforesaid, respondent will absolutely refuse to sell further supplies of its products to them, or any of them, and will also absolutely refuse to sell any jobbers, wholesalers, and retailers whatsoever who sell to other jobbers, wholesalers, or retailers failing to resell at the prices suggested by respondent.

Paragraph Eight: That respondent, in the carrying out of said policy—

(a) Has within the time aforementioned refused and does refuse to sell its products to practically all such jobbers, wholesalers, and retailers as do not resell at the prices so suggested by the respondent;

(b) Has within the time aforementioned refused and does refuse to sell to practically all such jobbers, wholesalers, and retailers reselling to other jobbers, wholesalers, and retailers who have failed to resell at the prices so suggested by the respondent;

(c) Has within the time aforementioned refused and does refuse, to sell to practically all so-called mail-order houses engaged in interstate commerce, on the ground that such mail-order houses
29 frequently sell at cut prices, and has within the time aforementioned refused and does refuse to sell to practically all jobbers, wholesalers, and retailers who sell its products to such mail-order houses;

(d) Has within the time aforementioned refused and does refuse to sell to practically all so-called price-cutters;

(e) Has maintained within the time aforementioned and does maintain a large force of so-called specialty salesmen or representatives who call upon the retail trade and solicit orders therefrom to be filled through jobbers and wholesalers, which orders are commonly known in the trade as "turnover orders"; that respondent's salesmen, under its instructions, have within the time aforementioned refused and do refuse to accept any such turnover orders to be filled through jobbers and wholesalers who themselves sell or have sold at less than the suggested resale prices or sell or have sold to jobbers, wholesalers and retailers who sell or have sold at less than such suggested resale prices; and in such cases have requested such retailers to name other jobbers;

(f) Has within the time aforementioned reinstated and does reinstate as distributors of its products, jobbers, wholesalers and retailers previously cut off or withdrawn from the list of selected jobbers, wholesalers and retailers for failure to resell at the prices suggested by the respondent and/or for selling to distributors who do not maintain such suggested resale prices, upon the basis of declarations, assurances, statements, promises and similar expressions, as the case may be by said distributors, respectively, which satisfy the

30 respondent that such distributors will thereafter resell at the prices suggested by the respondent and/or will refuse to sell to distributors who do not maintain such suggested resale prices;

(g) Has within the time aforementioned added and does add to its list of new distributors, concerns reported by its representatives as declaring that they intend to and will resell at the prices suggested by the respondent, and/or will refuse to sell to distributors who do not maintain such suggested resale prices;

(h) Has within the time aforementioned utilized a system of key numbers or symbols stamped or marked upon the cases containing "Beech-Nut Brand" products, thus enabling the respondent, for any purpose whatsoever, to ascertain the identity of the distributors from whom such products were purchased; and that repeatedly, within the time aforementioned, when instances of price-cutting have been reported to respondent by the selected wholesalers and retailers, or ascertained in other ways, its salesmen and representatives have been instructed by respondent to investigate, and that in pursuance of these instructions salesmen and representatives of respondent have by means of these key numbers or symbols traced the price cutters from whom the goods have been obtained and have thus ascertained the identity of such price cutters, and have also thus traced and ascertained the identity of distributors from whom price cutters have purchased "Beech-Nut Brand" products; and have thereafter refused to supply all such dealers with its products whether
31 such dealers were themselves cutting the suggested resale prices or were selling to dealers cutting the suggested resale prices.

(i) Has within the time aforementioned maintained and does maintain card records containing the names of thousands of jobbing wholesale and retail distributors, including the aforesaid selected distributors, and in furtherance of its refusals to sell goods either to distributors selling at less than the suggested resale price, or to distributors selling to other distributors selling at less than the suggested resale prices, has listed upon those cards bearing the names of such distributors the words "Undesirable—Price Cutters," "Do Not Sell," or "D. N. S." the abbreviation for "Do Not Sell," or expressions of a like character, to indicate that the particular distributor was not in the future to be supplied with respondent's goods on account of failure to maintain the aforesaid suggested resale prices or on account of failure to discontinue selling to dealers failing to maintain such suggested resale prices. When respondent has received declarations, assurances, statements, promises, and similar expressions, as the case may be, by said distributors, respectively, which satisfy the respondent that such distributors will resell at the prices suggested by respondent; and/or discontinue selling to distributors failing to maintain the resale prices suggested by respondent, said respondent has issued instructions to "Clear the record," or directions of similar import, notation of which is made on the cards, and has thereafter permitted shipments of its products to be

made to such distributors; and such distributors to whom
32 shipments are thus allowed to go forward constitute the respondent's list of so-called "selected" jobbers, wholesalers, and retailers, and no distributor is thus listed on such card records as one to whom goods are allowed to go forward who fails to maintain the resale prices suggested by respondent or sells to distributors failing to resell at such suggested prices; and when a jobber, wholesaler, or retailer is reported as failing to maintain the suggested resale prices, and/or as selling to distributors who fail to maintain such suggested resale prices, and has been entered in the card records as one to whom shipments should not go forward, respondent notifies those jobbers, wholesalers, and retailers who supply said distributor of this fact, and also notifies its specialty salesmen, and gives similar notices to said jobbers, wholesalers, and retailers and to its specialty salesmen when reinstatements are made in its said list of "selected" jobbers, wholesalers, and retailers.

Paragraph Nine: That individual jobbers and wholesale dealers, as shown by their letters, have made statements to the effect that they will support respondent and cooperate with it in its selling policy, and that they prefer to deal with respondent and will push its products on account of its refusal to supply goods to price cutters or to distributors supplying such price cutters; and that jobbers and wholesale dealers generally prefer to handle and push respondent's goods on which there is a constant fixed margin of profit, rather than the goods of manufacturers competing with the respondent who do not suggest resale prices and/or maintain the same by any means whatsoever.

33 Paragraph Ten: That the distributors handling respondent's goods have repeatedly reported to respondent instances of price cutting in their respective localities and in many cases have reported specifically the names of such price cutters and requested respondent to discontinue selling to them or selling to distributors selling to them; and that respondent has approved and furthered such action on the part of distributors handling its products by repeatedly expressing its appreciation of such notification in its letters of reply to such distributors; and has aided and abetted its distributors in such reporting of price cutters by repeatedly requesting its distributors to supply the names of such price cutters; and that upon receiving such reports respondent has instructed its salesmen to investigate, and when such salesmen have confirmed the reported price cutting has refused to supply the price cutter with further goods or to supply goods to distributors continuing to sell to such price cutters after notice to that effect.

Paragraph Eleven: That respondent in the distribution of its products sells "Beach-Nut Brand Pure Food Products" through wholesale and retail grocery dealers and its chewing gum and candy principally through wholesale and retail drug, candy, and tobacco dealers, and that the cost of wholesale and retail grocery, drug, candy,

and tobacco dealers handling the products manufactured by the respondent, as etimated by respondent's vice president, together with gross and net profit margins allowed such dealers under the suggested resale prices of the respondent, are as set out in the following table:

34 *Table showing the range of costs of wholesale and retail dealers handling Beech-Nut products in comparison with the gross and net profit margins of such wholesale and retail dealers under respondent's suggested prices.*

Class of dealer.	Range of cost of doing business on gross sales.	Gross profit margins allowed under respondent's suggested resale prices.		Net profit margin allowed under respondent's suggested resale prices.	
		Excluding cash discount.	Including cash discount.	Excluding cash discount.	Including cash discount.
Wholesale:	*Per cent.*	*Per cent.*	*Per cent.*	*Per cent.*	*Per cent.*
Grocery	5-9	*10 and 14.5	*12 and 16.5	1- 9.5	3-11.5
Drug	12-12.5	20	22	8- 8.5	10-10.5
Candy	10-16	20	22	4-10	6-12
Tobacco	5- 9	20	22	11-15	13-17
Retail:					
Grocery	12-20	**22-37	**24-39	2-25	4-27
Drug	25-30	40	42	10-15	12-17
Candy	20-30	40	42	10-20	12-22
Tobacco	20-30	40	42	10-20	12-22

* Excluding cash discount, 10% in less than carload lots and 14.5% in carload lots; including cash discount (20%), 12% in less than carload lots and 16.50% in carload lots.

** Depending on product and quantity purchased.

Paragraph Twelve: That these divergencies in the cost of doing business of both wholesalers and retailers are due respectively (a) to general differences in the character of the business of different types of wholesalers, i. e., grocery, drug, candy, and tobacco, on the one hand, and of different types of retailers, grocery, drug, candy, and tobacco, on the other; and (b) to individual differences as among the wholesalers of each type, on the one hand, and as among retailers of each type, on the other; in location of establishment, rate of turnover, efficiency of management, selling expenses, including use or nonuse of credit, use or nonuse of delivery service, etc.; and in numerous other economic factors of a similar character.

35 Paragraph Thirteen: That respondent constantly urges that wholesale and retail distributors of its products shall take the full profit suggested by respondent and circulates both wholesale and retail price lists showing suggested resale prices and gross profit margins to the said distributors under said prices.

Paragraph Fourteen: That the aforesaid gross profit margins are so adjusted as to induce a large number of jobbers and wholesalers, and also of retailers, to handle respondent's products; and these margins are greater than are necessary to enable the relatively lower cost and more efficient jobbers and wholesalers and relatively

lower cost and more efficient retailers, as set forth in Paragraph Eleven, to resell and make a profit.

Paragraph Fifteen: That respondent, by its policy of maintaining resale prices and refusing to sell jobbers, wholesalers, and retailers failing to adhere to such prices, and refusing to sell to jobbers, wholesalers, and retailers selling to other jobbers, wholesalers, and retailers failing to adhere to such prices, protects and has protected the relatively higher cost and less efficient jobbers, wholesalers, and retailers against the competition of the relatively lower cost and more efficient jobbers, wholesalers, and retailers, as shown in Paragraph Eleven.

Paragraph Sixteen: That the effect of the said price maintenance system enforced as aforesaid has been and is:

(1) To secure for the respondent, the Beech-Nut Packing Company, on the sales of the products manufactured by it, the
36 trade of jobbers, wholesalers, and retailers and including especially the relatively higher cost and more inefficient jobbers and the relatively higher cost and more inefficient retailers as heretofore set out and to enlist their active support and cooperation in enlarging the sale of the price maintained products manufactured by respondent to the prejudice of competing manufacturers who do not fix, require, or enforce the maintenance of resale prices upon their products.

(2) To eliminate competition in prices among jobbers, wholesalers, and retailers, respectively, handling the products manufactured by the respondent, thus preventing jobbers, wholesalers, and retailers, respectively, and especially the lower cost and more efficient establishments, from selling respondent's products at prices which they may deem adequate and which are warranted by their costs and selling efficiency as heretofore set out, whereby such portions of the public as require or prefer the products of the respondent are compelled to pay enhanced prices therefor.

(3) To tend to force manufacturers who do not fix, require to enforce the maintenance of resale prices and who compete with respondent, also to inaugurate, maintain, and enforce a system of resale prices upon their products in order to offset the preference of jobbers, wholesalers, and retailers, respectively, for the price maintained products of respondent, thus enabling such manufacturers as do not now maintain such resale prices to compete upon more equal terms with the respondent, and thereby tending to compel the public generally to pay enhanced prices for
37 the product of such competing manufacturers also.

Paragraph Seventeen. That the merchandising conduct of respondent, heretofore defined and as herein involved, does not constitute a contract or contracts whereby resale prices are fixed, maintained, and enforced.

Conclusions of law.

That the methods of competition set forth in the foregoing findings are under the circumstances therein set forth unfair methods of competition in interstate commerce in violation of the provisions of an act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

(Signed) WILLIAM B. COLVER, *Chairman.*
VICTOR MURDOCK.
HUSTON THOMPSON.

[SEAL.]

VII. That on or about the day last aforesaid the Federal Trade Commission did also make and file its order to cease and desist, in the words and figures following, to wit:

38 *Order to cease and desist.*

United States of America—Before Federal Trade Commission, ss.

At a regular session of the Federal Trade Commission held at its office in the city of Washington, D. C., on the 30th day of June, A. D. 1919.

Present: William B. Colver, chairman; John Franklin Fort, Victor Murdock, Huston Thompson, commissioners.

FEDERAL TRADE COMMISSION
vs.
BEECH-NUT PACKING COMPANY. } Docket No. 88.

The Federal Trade Commission having issued and served its complaint herein, wherein it alleged that it had reason to believe that the respondent, Beech-Nut Packing Company, has been and now is using unfair methods of competition in violation of the provisions of section 5 of an act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," and that a proceeding therein in respect to such alleged violation would be to the interest of the public, and fully stating its charges in that respect, and the respondent having duly entered its appearance by Charles
39 Wesley Dunn, its attorney, and having filed its answer, and it having been thereafter duly stipulated between the parties that said complaint should be deemed amended in certain respects and that respondent's said answer should stand as its answer to said complaint as so amended, and the attorneys for the above parties having signed and filed an agreed statement of facts wherein and whereby it was duly stipulated and agreed that said statement of facts should be taken by the Commission in lieu of testimony herein

and that the Commission might proceed upon said statement of facts to enter its report and findings as to the facts, its conclusions of law, and its order disposing of this proceeding, and the Commission on the date hereof having made and filed its report containing its findings as to the facts and its conclusions that respondent has violated section 5 of an act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," which said report is hereby referred to and made a part hereof.

Now, therefore, it is ordered, that respondent, Beech-Nut Packing Company, its officers, directors, agents, servants, and employees cease and desist from directly or indirectly recommending, requiring, or by any means bringing about the resale of Beech-Nut products by distributors, whether at wholesale or retail, according to any system of prices fixed or established by respondent, and more particularly by any or all of the following means:

1. Refusing to sell to any such distributors because of their failure to adhere to any such system of resale prices;

40 2. Refusing to sell to any such distributors because of their having resold respondent's said products to other distributors who have failed to adhere to any such system of resale prices;

3. Securing or seeking to secure the cooperation of its distributors in maintaining or enforcing any such system of resale prices;

4. Carrying out or causing others to carry out a resale price maintenance policy by any other means.

By the Commission.

J. P. YODER, *Secretary.*
EDWARD L. SMITH,
Acting Chief Counsel for the Commission.

[SEAL.]

VIII. That said order to cease and desist is erroneous, unauthorized, and not sufficient in law and ought to be reviewed and set aside, inasmuch as it appears from the record in this cause that—

1. The acts of petitioner described and set forth in said complaint, as amended, are not in themselves unfair and unlawful and do not constitute an unfair method of competition or unfair methods of competition in interstate commerce, in violation of the provisions of section 5 of the act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

2. The acts of petitioner described and set forth in said stipulation of facts are not in themselves unfair and unlawful and do not constitute an unfair method of competition or unfair methods

41 of competition in interstate commerce, in violation of the provisions of section 5 of the act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

3. The acts of petitioner described and set forth in said report and findings as to the facts are not in themselves unfair and unlawful

and do not constitute an unfair method of competition or unfair methods of competition in interstate commerce, in violation of the provisions of section 5 of the act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

4. The acts of petitioner described and set forth in said complaint, as amended, and in said stipulation of facts and in said report and findings as to the facts do not constitute an offense under the laws of the United States.

5. The said findings as to the facts are not supported by the said stipulation of facts.

6. The said conclusions of law are not supported by the said findings as to the facts or by the said stipulation of facts.

Wherefore no order to cease and desist ought to have been made in this cause and said complaint ought to have been dismissed, and, inasmuch as your petitioner is without remedy in the premises except in this court, as by statute in such case made and provided, your petitioner prays this court to review and set aside said order.

BEECH-NUT PACKING COMPANY,
By CHARLES WESLEY DUNN, *Its Attorney.*

42 United States Circuit Court of Appeals for the Second Circuit. Beech-Nut Packing Company, petitioner, v. Federal Trade Commission, respondent.

TRANSCRIPT OF RECORD.

43–44 *Certificate.*

United States of America—Before Federal Trade Commission, ss.

FEDERAL TRADE COMMISSION,
vs.
BEECH-NUT PACKING COMPANY. } Docket No. 88.

I, J. P. Yoder, secretary of the Federal Trade Commission, do hereby certify that hereto annexed is a full, true, and correct transcript of all the pleadings, stipulations, findings as to the facts and order introduced in the above-entitled proceeding, had before the Federal Trade Commission:

That Section I, pages 1 to 3, both inclusive, consists of a copy of the complaint issued by the Federal Trade Commission in said proceeding.

That Section II, pages 1 to 3, both inclusive, consists of a copy of the answer of the respondent, filed June 18, 1918.

That Section III, pages 1 to 4, both inclusive, consist of a copy of stipulation amending the complaint, dated June 11, 1919, and filed June 12, 1919.

That Section IV, pages 1 to 15, both inclusive, consists of a
45 copy of agreed statement of facts entered into between the Commission and attorney for respondent.

That Section V, pages 1 to 9, both inclusive, consists of a copy of the commission's findings as to the facts and conclusions of law, dated June 30, 1919.

That Section VI, pages 1 to 2, both inclusive, consists of a copy of the commission's order to cease and desist, dated January 30, 1919.

That this transcript is certified to the United States Circuit Court of Appeals for the Second Circuit, pursuant to service upon the Commission of a copy of a petition by Charles Wesley Dunn, attorney for the Beech-Nut Packing Company, filed in said court, to review the order of the commission made herein on June 30, 1919.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the Federal Trade Commission at Washington, in the Dis ict of Columbia, this 22d day of August, A. D. 1919.

[SEAL.] J. P. YODER, *Secretary.*

46 *Complaint.*

United States of America—Before Federal Trade Commission, ss.

At a regular session of the Federal Trade Commission, held at its office in the city of Washington, D. C., on the 15th day of April, A. D. 1918.

Present: William J. Harris, chairman; William B. Colver, J. Franklin Fort, Victor Murdock, commissioners.

FEDERAL TRADE COMMISSION
vs.
BEECH-NUT PACKING COMPANY. } Docket No. 88.

Complaint in the matter of the alleged violation of section 5 of an act of Congress approved September 26, 1914.

The Federal Trade Commission, having reason to believe from a preliminary investigation made by it, that the Beech-Nut Packing Company, hereinafter referred to as respondent, has been and is, using unfair methods of competition in interstate commerce in violation of the provisions of section 5 of an act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade
47 Commission, to define its powers and duties, and for other purposes," and it appearing that a proceeding by it in respect thereof would be to the interest of the public, issues this complaint, stating its charges in that respect, on information and belief as follows:

Paragraph One: That the respondent, Beech-Nut Packing Company, is now and was at all times hereinafter mentioned, a corporation organized, existing, and doing business under and by virtue

of the laws of the State of New York, having its principal factory, office, and place of business located at the town of Canajoharie, State of New York, now and for more than two years last past engaged in the manufacture and sale of chewing gum and food products among the several States of the United States, the Territories thereof and the District of Columbia, in direct competition with other persons, firms, copartnerships, and corporations similarly engaged.

Paragraph Two: That the respondent, Beech-Nut Packing Company, in the conduct of its business, manufactures such chewing gum so sold by it, in its factory located at the town of Canajoharie, State of New York, and purchases and enters into contracts of purchase for the necessary component materials needed therefor, in different States and Territories of the United States, causing the same to be transported to its factory where they are made into the finished product, sold and shipped to the purchasers thereof; that after
48 such products are so manufactured, they are continuously moved to, from, and among other States and Territories of the United States, the District of Columbia, and foreign countries, and there is continuously, and has been, at all times hereinafter mentioned, a constant current of trade and commerce in the said products between and among the various States and Territories of the United States and the District of Columbia, and especially to and through the town of Canajoharie, State of New York, and therefrom to and through other States and Territories of the United States and the District of Columbia.

Paragraph Three. That with the intent, purpose, and effect of stifling and suppressing competition in the manufacture, marketing and sale of its products in the course of such commerce, and as a means of securing the trade of dealers and obtaining their aid and cooperation in enlarging the sale of its products, and with the purpose of eliminating competition in the selling price among the various dealers in its products and thereby depriving the dealers of their freedom to sell such products at prices which, in their judgment, would be warranted by trade conditions and for other purposes, the respondent has fixed and maintained certain specified standard prices at which the products manufactured and sold by it shall be resold by the purchaser thereof, and requires its purchasers to agree to maintain or resell such products at such standard selling prices; and
49 that for the purpose of maintaining said standard resale prices and of inducing and compelling its customers to maintain and keep such standard prices, the respondent, for more than three months last past, has refused and is still now refusing to sell its products to customers or dealers who wili not agree to maintain such specified standard resale prices, or who do not resell such products at the specified standard selling prices so fixed and determined by the respondent as aforesaid.

Wherefore, notice is hereby given you, Beech-Nut Packing Company, that the charges of this complaint will be heard by the Federal

Trade Commission at its office in the Federal Trade Commission Building, 15th and K Streets, at the city of Washington, D. C., on the 6th day of June, 1918, at 10.30 o'clock in the forenoon of the said day, or as soon thereafter as the same may be reached, at which time and place you shall have the right to appear and show cause why an order should not be entered by the Federal Trade Commission requiring you to cease and desist from the violations of law charged in this complaint.

You will take notice that within thirty (30) days after the service of this complaint you are required to file with the Federal Trade Commission an answer in conformity with Rule III of the Rules of Practice before the Commission.

In witness whereof, the Federal Trade Commission has caused this complaint to be issued, signed by its secretary, and its official
50 seal to be affixed hereto, at the city of Washington, D. C., this 15th day of April, A. D. 1918.

By the Commission.

(Signed) LEONIDAS L. BRACKEN,
Secretary.

(Signed) JOHN WALSH,
Chief Counsel.

51 *Answer to complaint.*

United States of America—Federal Trade Commission.

FEDERAL TRADE COMMISSION,
vs.
BEECH-NUT PACKING COMPANY. } Docket No. 88.

And now comes the Beech-Nut Packing Company, the respondent herein, and for answer to the complaint of alleged violation of section 5 of the act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," says:

Paragraph One: That it admits the allegations contained in paragraph one of said complaint.

Paragraph Two: That it admits the allegations contained in paragraph two of said complaint.

Paragraph Three: That it denies each and every allegation in paragraph three of said complaint, excepting those hereinafter specifically admitted in this answer. It denies that it has entered into any agreement with any purchaser of its products fixing any price at which such products shall be resold or requiring any purchaser to maintain any resale price, or has in any way qualified
52 the title of such purchaser to any such products or the freedom of such purchaser to resell such products at any price, by any restrictive agreement whatever. Respondent admits that, for more than three months last past, it has suggested selling prices to the immediate purchasers of its products, for use by such pur-

chasers in the resale of said products, which prices were fair and reasonable in all respects. Respondent further admits that during said period it has refused to continue to sell its products to dealers who did not resell such products at the fair and reasonable prices suggested by it.

Paragraph Four: That the acts admitted in paragraph three of this answer do not constitute a violation of section 5 of the said act of Congress approved September 26, 1914.

Paragraph Five: That the acts admitted in paragraph three of this answer do not constitute an offense under the laws of the United States.

Wherefore, this respondent prays that said complaint be dismissed.

BEECH-NUT PACKING COMPANY,
By BARTLETT ARKELL, *President.*
CHARLES WESLEY DUNN,
Attorney for Respondent,
Post-office address, 32 Liberty Street, New York, N. Y.

53 *Stipulation amending complaint.*

United States of America—Before Federal Trade Commission, ss.

FEDERAL TRADE COMMISSION,
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} Docket No. 88.

It is hereby stipulated by and between the attorneys for the respective parties hereto that the complaint herein be deemed amended by inserting in paragraph two thereof, after the words, "chewing gum," the words "and food products," and that paragraph three of the complaint be, and the same is, hereby amended so as to read as follows:

"Paragraph Three: That the respondent, the Beech-Nut Packing Company, has adopted and enforced a system of fixing and maintaining certain specified standard prices at which its said chewing gum and food products shall be resold by purchasers thereof, including jobbers, wholesalers, and retailers, with the purpose and effect of securing the trade of such jobbers, wholesalers, and retailers and of enlisting their active support and cooperation in enlarging the sale of respondent's said products, to the prejudice of competitors of respondent who do not require and enforce the maintenance of
54 resale prices on their products; and with the purpose and effect of eliminating competition in prices among all jobbers, wholesalers, and retailers, respectively, engaged in handling the products manufactured by respondent, thereby depriving such distributors of their right to sell, and preventing them from selling, said products at such prices as they may deem to be, and as are, adequate and warranted by their respective selling costs and effi-

ciency, and with various other effects; and that respondent as a means of making effective its said system of resale prices as aforesaid and of inducing and compelling its customers and the dealer customers of its customers to maintain such resale prices, has for more than two years last past: (a) Made it generally known to said jobbers, wholesalers, and retailers, respectively, that it required and insisted that they should sell said products at the resale prices so fixed by respondent, and refuse to sell the same to jobbers, wholesalers, or retailers not maintaining such prices; (b) threatened to, and did, refuse to sell to all jobbers, wholesalers, and retailers who failed to maintain the resale prices so fixed by respondent, or who sold to other distributors who failed to maintain such prices; (c) induced or compelled said jobbers, wholesalers, and retailers, by divers other means, not only to maintain its resale prices fixed as aforesaid but also to discontinue selling said products to other jobbers, wholesalers, and retailers who did not maintain such resale prices; (d) caused the diversion of retailer's orders away from jobbers and wholesalers who did not maintain such resale prices so fixed by respondent or who had resold its products to other jobbers, wholesalers, or retailers who had failed to maintain such resale prices, and caused such orders to be given to other jobbers and wholesalers who had maintained such resale prices and/or had refused to supply other jobbers, wholesalers, and retailers failing to maintain such prices; (e) solicited and secured the cooperation of wholesalers, jobbers, and retailers in reporting price cutters, all in pursuance of its efforts to ascertain the names of all distributors of its products who had failed to maintain the resale prices fixed by it, as aforesaid, and/or who had resold to other jobbers, wholesalers, and retailers failing to maintain such prices; (f) entered in card records kept by it the names of all dealers reported to it, either in this or other ways, as not maintaining said resale prices, or as selling to other distributors on maintaining such prices, and has taken various measures to prevent all such dealers from obtaining further shipments of its products from any source until it has received from them declarations, promises, assurances, statements, or other similar expressions, to the effect that in the future such dealers intend to and will sell such products at the resale prices fixed by respondent and will refrain from selling the same to other jobbers, wholesalers, and retailers failing to maintain such prices; (g) employed various other means and methods for the enforcement of its said system of maintaining resale prices."

55

And it is further stipulated that the answer of the respondent heretofore filed herein shall stand as respondent's answer to said complaint as hereby amended.

56

(Signed) EDWARD L. SMITH,
Acting Chief Counsel for Federal Trade Commission.

(Signed) CHARLES WESLEY DUNN,
Acting for Respondent, Beech-Nut Packing Company.

Dated this 11th day of June, 1919.

57 *Agreed statement of facts.*

United States of America—Before Federal Trade Commission, ss.

At a regular session of the Federal Trade Commission held at its office in the city of Washington, D. C., on the 11th day of June, A. D. 1919.

Present: William B. Colver, chairman; John Franklin Fort, Victor Murdock, Huston Thompson, commissioners.

FEDERAL TRADE COMMISSION
vs.
BEECH-NUT PACKING COMPANY. } Docket No. 88.

Agreed statement of facts.

The Federal Trade Commission having issued and served its complaint herein, and respondent, Beech-Nut Packing Company, a corporation, having entered its appearance by Charles Wesley Dunn, attorney, and having filed its answer admitting certain allegations of said complaint and denying certain others, and both parties to this proceeding being desirous of expediting the disposition
58 thereof, it is hereby stipulated and agreed, subject to the approval of the Commission, that the following statement of facts shall be taken by the Commission in lieu of testimony herein and that the Commission may forthwith proceed upon such agreed statement of facts to make and enter its report and findings as to the facts, its conclusions of law, and its order disposing of this proceeding:

1. That the respondent, Beech-Nut Packing Company, is a corporation organized and doing business under the laws of the State of New York, and having its principal office and place of business in the town of Canajoharie, State of New York, and is now, and for more than four years last past, has been engaged in the business of manufacturing and selling chewing gum and food products throughout the States of the United States, the Territories thereof, and the District of Columbia, in direct competition with other persons, copartnerships, and corporations similarly engaged.

2. That in the conduct of its business respondent purchases the component parts of the chewing gum and food products in the various States of the United States, the Territories thereof, and in foreign countries, and has the same transported through said other States and Territories and foreign countries, in and to the town of Canajoharie, and other points in the State of New York, and there said respondent manufactures and puts up and from there sells and ships to the purchasers thereof in the different States and Ter-
59 ritories of the United States and the District of Columbia and in foreign countries, the said chewing gum and food products, and there is continuously and has been at all times herein men-

tioned, a constant current of trade and commerce in said chewing gum and food products between and among the several States, Territories, and District of Columbia of the United States and foregin countries.

3. That the quantity of such products so manufactured, sold, and distributed by respondent has been and is substantial, and forms an important item of commerce among the several States, Territories, and District of Columbia of the United States and with foreign countries.

4. That respondent customarily markets its products principally through jobbers and wholesalers in the grocery, drug, candy, and tobacco lines, who in turn resell to retailers in these lines, all of which wholesale and retail dealers are selected as desirable customers for the reason that they are known or believed to be (a) of good credit standing; (b) willing to resell at the resale prices suggested by respondent and do resell at such prices, as hereinafter set forth; (c) willing to refuse to sell and do refuse to sell to jobbers, wholesalers, and retailers who do not resell at the resale prices suggested by respondent, and who do not sell to such jobbers, wholesalers, and retailers as also hereinafter set forth; (d) good and satisfactory merchandisers in other respects.

Such jobbers, wholesalers, and retailers are designated by
60 the respondent as "selected" or "desirable" dealers. Respondent also sells "direct" in a few instances to certain large retailers who are selected on the same basis as the aforesaid jobbers, wholesalers, and retailers. The total number of such dealers handling the products of respondent includes the greater proportion of the jobbers, wholesalers, and retailers, respectively, in the grocery trade and a large proportion of the jobbers, wholesalers, and retailers in the drug, candy, and tobacco trades, respectively, throughout the United States.

5. That respondent, in the sale and distribution of its products, has adopted and maintained, and still maintains, a policy known as the "Beech-Nut policy," and requests the cooperation therein of all dealers selling the products manufactured by it, dealing with each customer separately. Concerning this policy, respondent made a statement on or about February 13, 1916, in a circular letter sent to all jobbers handling "Beech-Nut" products, copy of which letter follows:

"FEBRUARY 13, 1916.

Subject—The Beech-Nut policy.

To jobbers:

For years we have been trying to have our jobbing and dealer friends understand the Beech-Nut merchandising policy. In a word it is this:

First: To produce products that are full value, unequaled
61 as to character and flavor, manufactured under ideal conditions by intelligent, well-paid employees.

Second: To provide a fair profit for those who distribute Beech-Nut products.

Third: To provide, as far as we legally may, such protection as will insure to Beech-Nut distributors the full profit to which they are entitled for their efforts.

We feel we are getting more and more cooperation from those who understand the Beech-Nut policy and we wish to emphasize it to all who are anxious to reap full return for their labor.

Now, if the Beech-Nut policy is the right one, we want your continued and enthusiastic cooperation, and we stand ready to see that you get the profit which the distribution of Beech-Nut products provides.

Can anything be fairer?

Yours, very truly,

BEECH-NUT PACKING COMPANY."

In order to carry out said Beech-Nut policy and to secure such cooperation respondent

(a) Issues circulars, price lists, and letters to the trade gen-
62 erally showing suggested uniform resale prices, both wholesale and retail, to be charged for Beech-Nut products.

(b) Requests and insists that the aforesaid selected jobbers, wholesalers and retailers resell only at the suggested resale prices.

(c) Requests and insists that the aforesaid selected jobbers, wholesalers and retailers sell only to such other jobbers, wholesalers and retailers as have been and are willing to resell and do resell at the prices so suggested by the respondent; and requests and insists that such jobbers, wholesalers and retailers discontinue selling to other jobbers, wholesalers and retailers who fail to resell at the prices so suggested by respondent.

(d) Makes it known broadcast to such selected jobbers, wholesalers and retailers, whether sold "direct" or not, that if they, or any of them, fail to sell at the resale prices suggested by the respondent as aforesaid, respondent will absolutely refuse to sell further supplies of its products to them, or any of them, and will also absolutely refuse to sell any jobbers, wholesalers and retailers whatsoever who sell to other jobbers, wholesalers or retailers failing to resell at the prices suggested by respondent.

6. That respondent, in the carrying out of said policy

(a) Has within the time aforementioned refused and does
63 refuse to sell its products to practically all such jobbers, wholesalers and retailers as do not resell at the prices so suggested by the respondent;

(b) Has within the time aforementioned refused and does refuse to sell to practically all such jobbers, wholesalers and retailers reselling to other jobbers, wholesalers and retailers who have failed to resell at the prices so suggested by the respondent;

(c) Has within the time aforementioned refused and does refuse, to sell to practically all so-called mail-order houses engaged in in-

terstate commerce, on the ground that such mail-order houses fr
quently sell at cut prices, and has within the time aforementione
refused and does refuse to sell to practically all jobbers, wholesale
and retailers who sell its products to such mail-order houses;

(d) Has within the time aforementioned refused and does refu
to sell to practically all so-called price cutters;

(e) Has maintained within the time aforementioned and do
maintain a large force of so-called specialty salesmen or represent
tives who call upon the retail trade and solicit orders therefro
to be filled through jobbers and wholesalers, which orders are com
monly known in the trade as "turn-over orders"; that respondent'
salesmen, under its instructions, have within the time afore
64 mentioned refused and do refuse to accept any such turnove
orders to be filled through jobbers and wholesalers who them
selves sell or have sold at less than the suggested resale prices or se
or have sold to jobbers, wholesalers and retailers who sell or have
less than such suggested resale prices; and in such cases have re
quested such retailers to name other jobbers;

(f) Has within the time aforementioned reinstated and does rein
state as distributors of its products, jobbers, wholesalers and retaile
previously cut off or withdrawn from the list of selected jobber
wholesalers and retailers for failure to resell at the prices suggeste
by the respondent and/or for selling to distributors who do not main
tain such suggested resale prices, upon the basis of declarations, as
surances, statements, promises and similar expressions, as the cas
may be, by said distributors, respectively, which satisfy the respond
ent that such distributors will thereafter resell at the prices suggeste
by the respondent and/or will refuse to sell to distributors who d
not maintain such suggested resale prices;

(g) Has within the time aforementioned added and does add t
its list of new distributors, concerns reported by its representative
as declaring that they intend to and will resell at the prices sug
gested by the respondent, and/or will refuse to sell to distributor
who do not maintain such suggested resale prices;

(h) Has within the time aforementioned utilized a system
65 of key numbers or symbols stamped or marked upon the cases
containing "Beech-Nut Brand" products, thus enabling the
respondent, for any purpose whatsoever, to ascertain the identity of
the distributors from whom such products were purchased and that
repeatedly, within the time aforementioned, when instances of price-
cutting have been reported to respondent by the selected wholesalers
and retailers or ascertained in other ways its salesmen and repre-
sentatives have been instructed by respondent to investigate, and
that in pursuance of these instructions salesmen and representatives
of respondent have by means of these key numbers or symbols traced
the price cutters from whom the goods have been obtained and have
thus ascertained the identity of such price cutters, and have also
thus traced and ascertained the identity of distributors from whom
price cutters have purchased "Beech-Nut Brand" products; and

have thereafter refused to supply all such dealers with its products, whether such dealers were themselves cutting the suggested resale prices or were selling to dealers cutting the suggested resale prices;

(i) Has within the time aforementioned maintained and does maintain card records containing the names of thousands of jobbing, wholesale, and retail distributors, including the aforesaid selected distributors, and in furtherance of its refusals to sell goods either to distributors selling at less than the suggested resale prices or to distributors selling to other distributors selling at less than
66 the suggested resale prices, has listed upon these cards bearing the names of such distributors, the words "Undesirable—Price Cutters," "Do not Sell," or "D. N. S.," the abbreviation for "Do Not Sell," or expressions of a like character, to indicate that the particular distributor was not, in the future, to be supplied with respondent's goods on account of failure to maintain the aforesaid suggested resale prices or on account of failure to discontinue selling to dealers failing to maintain such suggested resale prices. When respondent has received declarations, assurances, statements, promises, and similar expressions, as the case may be, by said distributors, respectively, which satisfy the respondent that such distributors will resell at the prices suggested by respondent, and/or discontinuing selling to distributors failing to maintain the resale prices suggested by respondent, said respondent has issued instructions to "Clear the record," or directions of similar import, notation of which is made on the cards, and has thereafter permitted shipments of its products to be made to such distributors; and such distributors to whom shipments are thus allowed to go forward constitute the respondent's list of so-called "selected" jobbers, wholesalers and retailers, and no distributor is thus listed on such card records as one to whom goods are allowed to go forward who fails to maintain the resale prices suggested by respondent or sells to distributors failing to resell at such suggested prices; and when a jobber, wholesaler or retailer is reported as failing to maintain the suggested resale prices,
67 and/or as selling to distributors who fail to maintain such suggested resale prices, and has been entered in the card records as one to whom shipments should not go forward, respondent notifies those jobbers, wholesalers and retailers who supply said distributor of this fact, and also notifies its specialty salesmen and gives similar notices to said jobbers, wholesalers, and retailers and to its specialty salesmen when reinstatements are made in its said list of "selected" jobbers, wholesalers, and retailers.

7. That individual jobbers and wholesale dealers as shown by their letters have made statements to the effect that they will support respondent and cooperate with it in its selling policy and that they prefer to deal with respondent and will push its products on account of its refusal to supply goods to price cutters or to distributors supplying such price cutters, and that jobbers and wholesale dealers generally prefer to handle and push respondent's goods, on which there is a constant fixed margin of profit, rather than the goods of

manufacturers competing with the respondent, who do not suggest resale prices and/or maintain the same by any means whatsoever.

8. That the distributors handling respondent's goods have repeatedly reported to respondent instances of price cutting in their respective localities and in many cases have reported specifically the names of such price cutters and requested respondent to discontinue selling to them or selling to distributors selling to them,
68 and that respondent has approved and furthered such action on the part of distributors handling its products by repeatedly expressing its appreciation of such notification in its letters of reply to such distributors, and has aided and abetted its distributors in such reporting of price cutters by repeatedly requesting its distributors to supply the names of such price cutters, and that upon receiving such reports respondent has instructed its salesmen to investigate, and when such salesmen have confirmed the reported price cutting has refused to supply the price cutter with further goods or to supply goods to distributors continuing to sell to such price cutters after notice to that effect.

9. That respondent, in the distribution of its products, sells "Beech-Nut Brand Pure Food Products" through wholesale and retail grocery dealers and its chewing gum and candy principally through wholesale and retail drug, candy, and tobacco dealers, and that the cost of wholesale and retail grocery, drug, candy, and tobacco dealers handling the products manufactured by the respondent, as estimated by respondent's vice president, together with gross and net profit margins allowed such dealers under the suggested resale prices of the respondent, are set out in the following table:

Table showing the costs of wholesale and retail dealers handling Beech-Nut products in comparison with the gross and net profit margins of such wholesale and retail dealers under respondent's suggested prices.

69

Class of dealer.	Cost of doing business on gross.	Gross profit margins allowed under respondent's suggested resale prices.		Net profit margin allowed under respondent's suggested resale prices.	
		Including cash discount.	Excluding cash discount.	Including cash discounts.	Excluding cash discounts.
Wholesale:	*Per cent.*	*Per cent.*	*Per cent.*	*Per cent.*	*Per cent.*
Grocery	5- 9	*12-16.5	*10-14.5	3-11.5	1- 9.5
Drug	12-12.5	22	20	10-10.5	8- 8.5
Candy	10-16	22	20	6-12	4-10
Tobacco	5- 9	22	20	13-17	11-15
Retail:					
Grocery	12-20	**24-39	**22-37	4-27	2-25
Drug	25-30	42	40	12-17	10-15
Candy	20-30	42	40	12-22	10-20
Tobacco	20-30	42	40	12-22	10-20

* 10 or 12 in L. C. L. lots. 14.5 or 16.5 in C. L. lots.
** Depending on product and quantity purchased.

10. That these divergencies in the cost of doing business of both wholesalers and retailers are due, respectively (a), to general differences in the character of the business of different types of wholesalers, i. e., grocery, drug, candy, and tobacco, on the one hand, and of different types of retailers, grocery, drug, candy, and to-
70 bacco, on the other; and (b) to individual differences as among the wholesalers of each type, on the one hand, and as among retailers of each type, on the other; in location of establishment, rate of turnover, efficiency of management, selling expenses, including use or nonuse of credit, use or nonuse of delivery service, etc.; and in numerous other economic factors of a similar character.

11. That respondent constantly urges that wholesale and retail distributors of its products shall take the full profit suggested by respondent and circulates both wholesale and retail price lists, showing suggested resale prices and gross profit margins to the said distributors under said prices.

12. That the merchandising conduct of respondent heretofore defined and as herein involved does not constitute a contract or contracts whereby resale prices are fixed, maintained, and enforced.

13. Nothing herein contained shall preclude the respondent from questioning or reviewing any order of the commission which may be made herein, the purpose of this stipulation being merely to make an agreed statement of facts.

(Signed) EDWARD L. SMITH,
Acting Chief Counsel for the Federal Trade Commission.

(Signed) CHARLES WESLEY DUNN,
Attorney for Respondent, Beech-Nut Packing Company.

Dated this 11th day of June, 1919.

71 *Report and findings.*

United States of America—Before Federal Trade Commission, ss.

At a regular session of the Federal Trade Commission, held at its office in the city of Washington, D. C., on the 30th day of June, A. D. 1919.

Present: William B. Colver, chairman; John Franklin Fort, Victor Murdock, Huston Thompson, commissioners.

FEDERAL TRADE COMMISSION
vs.
BEECH-NUT PACKING COMPANY. } Docket No. 88.

The Federal Trade Commission having issued and served its complaint herein, wherein it alleged that it had reason to believe that the above-named respondent, Beech-Nut Packing Company, has been

and now is using unfair methods of competition in interstate commerce in violation of the provisions of section 5 of an act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," and that a proceeding by it in respect to such
72 alleged violation would be to the interest of the public, and fully stating its charges in that respect, and the respondent having entered its appearance by Charles Wesley Dunn, its attorney, and having filed its answer, and it having been thereafter duly stipulated between the parties that said complaint shall be deemed amended in certain respects and that respondent's said answer should stand as its answer to said complaint as so amended, and the attorneys for both parties having duly signed and filed an agreed statement of facts wherein and whereby it was stipulated and agreed that said statement of facts should be taken by the Commission in lieu of testimony herein, and that the Commission might forthwith proceed upon such agreed statement of facts to make and enter its report and findings as to the facts, its conclusions of law, and its order disposing of this proceeding; the Commission having duly considered the record and being fully advised in the premises, now makes its report and findings as to the facts and conclusions of law:

Findings as to the facts.

Paragraph One: That the respondent, Beech-Nut Packing Company, is a corporation organized and doing business under the laws of the State of New York, and having its principal office and place of business in the town of Canajoharie, State of New York, and is now, and for more than four years last past has been engaged in the business of manufacturing and selling chewing gum and
73 food products throughout the States of the United States, the Territories thereof, and the District of Columbia, in direct competition with other persons, co-partnerships, and corporations similarly engaged.

Paragraph Two: That in the conduct of its business respondent purchases the component parts of the chewing gum and foods products in the various States of the United States, the Territories thereof, and in foreign countries, and has the same transported through said other states and territories and foreign countries, in and to the town of Canajoharie, and other points in the State of New York, and there said respondent manufactures and puts up and from there sells to the purchasers thereof in the different States and Territories of the United States and the District of Columbia and in foreign countries, the said chewing gum and food products, and there is continuously and has been at all times herein mentioned, a constant current of trade and commerce in said chewing gum and food products between and among the several States, Ter-

ritories, and District of Columbia of the United States, and foreign countries.

Paragraph Three: That the quantity of such products so manufactured, sold, and distributed by respondent, has been and is substantial, and forms an important item of commerce among the several States, Territories, and District of Columbia of the United States, and with foreign countries.

74 Paragraph Four: That respondent customarily markets its products principally through jobbers and wholesalers in the grocery, drug, candy, and tobacco lines, who in turn resell to retailers in these lines, all of which wholesale and retail dealers are selected as desirable customers for the reason that they are known or believed to be (a) of good credit standing; (b) willing to resell at the resale prices suggested by respondent and who do resell at such prices, as hereinafter set forth; (c) willing to refuse to sell and who do refuse to sell to jobbers, wholesalers, and retailers who do not resell at the resale prices suggested by respondent, and who do not sell to such jobbers, wholesalers, and retailers as also hereinafter set forth; (d) good and satisfactory merchandisers in other respects. Such jobbers, wholesalers, and retailers are designated by the respondent as "selected" or "desirable" dealers. Respondent also sells "direct" in a few instances to certain large retailers who are selected on the same basis as the aforesaid jobbers, wholesalers, and retailers. The total number of such dealers handling the products of respondent includes the greater proportion of the jobbers, wholesalers, and retailers, respectively, in the grocery trades and a large proportion of the jobbers, wholesalers, and retailers in the drug, candy, and tobacco trades, respectively, throughout the United States.

Paragraph Five: That respondent, in the sale and distribution of its products, has adopted and maintained, and still main-
75 tains, policy known as the "Beech-Nut policy," and requests the cooperation therein of all dealers selling the products manufactured by it, dealing with each customer separately.

Paragraph Six: That the purpose and intent of the respondent company in this merchandising policy is, among other things,

(a(To provide a profit for all of its so-called selected distributors which was and is the full profit arbitrarily fixed and established by the respondent according to its system of uniform resale prices, the maintenance of which the respondent requires and enforces upon all of its distributors, both wholesale and retail.

(b) To provide for all its distributors protection in securing such full profit on the products manufactured by respondent.

(c) To obtain the active support and cooperation of all its distributors, both wholesale and retail:

(1) In maintaining its said resale prices and pushing its price-maintained products.

(2) In preventing and eliminating all sales at lower prices than its fixed uniform resale prices.

(3) In preventing wholesale dealers and jobbers from sell-
76 ing its products to retail dealers who sell or have sold, at prices lower than the fixed uniform resale prices at which it requires retailers to resell.

Paragraph Seven: In order to carry out said Beech-Nut policy and to secure such cooperation, respondent

(a) Issues circulars, price lists, and letters to the trade generally showing suggested uniform resale prices, both wholesale and retail, to be charged for Beech-Nut products.

(b) Requests and insists that the aforesaid selected jobbers, wholesalers, and retailers resell only at the suggested resale prices.

(c) Requests and insists that the aforesaid selected jobbers, wholesalers, and retailers sell only to such other jobbers, wholesalers, and retailers as have been and are willing to resell and do resell at the prices so suggested by the respondent; and requests and insists that such jobbers, wholesalers, and retailers discontinue selling to other jobbers, wholesalers, and retailers who fail to resell at the prices so suggested by respondent.

(d) Makes it known broadcast to such selected jobbers, wholesalers, and retailers, whatever sold "direct" or not, that if they, or any of them, fail to sell at the resale prices suggested by the respond-
ent as aforesaid, respondent will absolutely refuse to sell fur-
77 ther supplies of its products to them, or any of them, and will also absolutely refuse to sell any jobbers, wholesalers, and retailers whatsoever who sell to other jobbers, wholesalers, or retailers failing to resell at the prices suggested by respondent.

Paragraph Eight: That respondent, in the carrying out of said policy

(a) Has within the time aforementioned refused and does refuse to sell its products to practically all such jobbers, wholesalers, and retailers as do not resell at the prices so suggested by the respondent;

(b) Has within the time aforementioned refused and does refuse to sell to practically all such jobbers, wholesalers, and retailers reselling to other jobbers, wholesalers, and retailers who have failed to resell at the prices so suggested by the respondent;

(c) Has within the time aforementioned refused and does refuse to sell to practically all so-called mail-order houses engaged in interstate commerce, on the ground that such mail-order houses frequently sell at cut prices, and has within the time aforementioned refused and does refuse to sell to practically all jobbers, wholesalers, and retailers who sell its products to such mail-order houses;

(d) Has within the time aforementioned refused and does refuse to sell to practically all so-called price cutters;

78 (e) Has maintained within the time aforementioned and does maintain a large force of so-called specialty salesmen or representatives who call upon the retail trade and solicit orders therefrom to be filled through jobbers and wholesalers, which orders are commonly known in the trade as "turnover orders"; that respondent's salesmen, under its instructions, have within the time

aforementioned refused and do refuse to accept any such turnover orders to be filled through jobbers and wholesalers who themselves sell or have sold at less than the suggested resale prices or sell or have sold to jobbers, wholesalers, and retailers who sell or have sold at less than such suggested resale prices; and in such cases have requested such retailers to name other jobbers;

(f) Has within the time aforementioned reinstated and does reinstate as distributors of its products jobbers, wholesalers, and retailers previously cut off or withdrawn from the list of selected jobbers, wholesalers, and retailers for failure to resell at the prices suggested by the respondent and/or for selling to distributors who do not maintain such suggested resale prices, upon the basis of declarations, assurances, statements, promises, and similar expressions, as the case may be, by said distributors, respectively, which satisfy the respondent that such distributors will thereafter resell at the prices suggested by the respondent and/or will refuse to sell to distributors who do not maintain such suggested resale prices;

79 (g) Has within the time aforementioned added and does add to its list of new distributors, concerns reported by its representatives as declaring that they intend to and will resell at the prices suggested by the respondent, and/or will refuse to sell to distributors who do not maintain such suggested resale prices;

(h) Has within the time aforementioned utilized a system of key numbers or symbols stamped or marked upon the cases containing "Beech-Nut Brand" products, thus enabling the respondent, for any purpose whatsoever, to ascertain the identity of the distributors from whom such products were purchased; and that repeatedly, within the time aforementioned, when instances of price cutting have been reported to respondent by the selected wholesalers and retailers, or ascertained in other ways, its salesmen and representatives have been instructed by respondent to investigate, and that in pursuance of these instructions salesmen and representatives of respondent have by means of these key numbers or symbols traced the price cutters from whom the goods have been obtained and have thus ascertained the identity of such price cutters, and have also thus traced and ascertained the identity of distributors from whom price cutters have purchased "Beech-Nut Brand" products; and have thereafter refused to supply all such dealers with its products, whether such dealers were themselves cutting the suggested resale prices or were selling to dealers cutting the suggested resale prices;

80 (i) Has within the time aforementioned maintained and does maintain card records containing the names of thousands of jobbing wholesale and retail distributors, including the aforesaid selected distributors, and in furtherance of its refusals to sell goods either to distributors selling at less than the suggested resale price, or to distributors selling to other distributors selling at less than the suggested resale prices, has listed upon those cards bearing the names of such distributors, the words "Undesirable—Price Cutters," "Do

Not Sell," or "D. N. S.," the abbreviation for "Do Not Sell" or expressions of a like character, to indicate that the particular distributor was not, in the future, to be supplied with respondent's goods on account of failure to maintaing the aforesaid suggested resale prices or on account of failure to discontinue selling to dealers failing to maintain such suggested resale prices. When respondent has received declarations, assurances, statements, promises, and similar expressions, as the case may be, by said distributors, respectively, which satisfy the respondent that such distributors will resell at the prices suggested by the respondent, and/or discontinue selling to distributors failing to maintain the resale prices suggested by respondent, said respondent has issued instructions to "Clear the record," or directions of similar import, notation of which is made on the cards, and has thereafter permitted shipments of its products to be made to such distributors; and such distributors to whom shipments are thus allowed to go forward constitute the respondent's list of so-
81 called "selected" jobbers, wholesalers and retailers, and no distributor is thus listed on such card records as one to whom goods are allowed to go forward who fails to maintain the resale prices suggested by respondent or sells to distributors failing to resell at such suggested prices; and when a jobber, wholesaler or retailer is reported as failing to maintain the suggested resale prices, and/or as selling to distributors who fail to maintain such suggested resale prices, and has been entered in the card records as one to whom shipments should not go forward, respondent notifies those jobbers, wholesalers and retailers who supply said distributor of this fact, and also notifies its specialty salesmen, and gives similar notices to said jobbers, wholesalers, and retailers and to its specialty salesmen when reinstatements are made in its said list of "selected" jobbers, wholesalers, and retailers.

Paragraph Nine: That individual jobbers and wholesale dealers, as shown by their letters, have made statements to the effect that they will support respondent and cooperate with it in its selling policy and that they prefer to deal with respondent and will push its products on account of its refusal to supply goods to price cutters or to distributors supplying such price cutters; and that jobbers and wholesale dealers generally prefer to handle and push respondent's goods on which there is a constant fixed margin of profit, rather than the goods of manufacturers competing with the respondent who do not suggest resale prices and/or maintain the same by any means whatsoever.

82 Paragraph Ten: That the distributors handling respondent's goods have repeatedly reported to respondent instances of price cutting in their respective localities and in many cases have reported specifically the names of such price cutters and requested respondent to discontinue selling to them or selling to distributors selling to them, and that respondent has approved and furthered such action on the part of distributors handling its products by repeatedly expressing its appreciation of such notification in its letters

of reply to such distributors; and has aided and abetted its distributors in such reporting of price cutters by repeatedly requesting its distributors to supply the names of such price cutters; and that upon receiving such reports respondent has instructed its salesmen to investigate, and when such salesmen have confirmed the reported price cutting, has refused to supply the price cutter with further goods or to supply goods to distributors continuing to sell to such price cutters after notice to that effect.

Paragraph Eleven: That respondent, in the distribution of its products sells "Beech-Nut Brand Pure Food Products" through wholesale and retail grocery dealers and its chewing gum and candy principally through wholesale and retail drug, candy, and tobacco dealers, and that the cost of wholesale and retail grocery, drug, candy, and tobacco dealers handling the products manufactured by the respondent, as estimated by respondent's vice president, together with gross and net profit margins allowed such dealers under the suggested resale prices of the respondent, are as set out in the following table:

83 *Table showing the range of costs of wholesale and retail dealers handling Beech-Nut products in comparison with the gross and net profit margins of such wholesale and retail dealers under respondent's suggested price.*

Class of dealer.	Range of costs of doing business on gross sales.	Gross profit margins allowed under respondent's suggested resale prices.		Net profit margin allowed under respondent's suggested resale prices.	
		Excluding cash discount.	Including cash discount.	Excluding cash discount.	Including cash discount.
Wholesale:	*Per cent.*	*Per cent.*	*Per cent.*	*Per cent.*	*Per cent.*
Grocery	5–9	*10 & 14.5	*12 & 16.5	1–9.5	3–11.5
Drug	12–12.5	20	22	8–8.5	10–10.5
Candy	10–16	20	22	4–10	6–12
Tobacco	5–9	20	22	11–15	13–17
Retail:					
Grocery	12–20	**22–37	**24–39	2–25	4–27
Drug	25–30	40	42	10–15	12–17
Candy	20–30	40	42	10–20	12–22
Tobacco	20–30	40	42	10–20	12–22

*Excluding cash discount, 10% in less than carload lots and 14.5% in carload lots; including cash discounts (2%), 12% in less than carload lots and 16.5% in carload lots.
**Depending on product and quantity purchased.

84 Paragraph Twelve: That these divergencies in the cost of doing business of both wholesalers and retailers are due respectively (a) to general differences in the character of the business of different types of wholesalers, i. e., grocery, drug, candy and tobacco, on the one hand, and of different types of retailers, grocery, drug, candy, and tobacco, on the other; and (b) to individual differences as among the wholesalers of each type, on the one hand, and as among retailers of each type, on the other; in location of establishment, rate of turnover, efficiency of management, selling expenses, including use or nonuse of credit, use or nonuse of delivery

service, etc.; and in numerous other economic factors of a similar character.

Paragraph Thirteen: That respondent constantly urges that wholesale and retail distributors of its products shall take the full profit suggested by respondent and circulates both wholesale and retail price lists showing suggested resale prices and gross profit margins to the said distributors under said prices.

Paragraph Fourteen: That the aforesaid gross profit margins are so adjusted as to induce a large number of jobbers and wholesalers and also of retailers to handle respondent's products; and these margins are greater than are necessary to enable the relatively lower cost and more efficient jobbers and wholesalers and relatively lower cost and more efficient retailers, as set forth in paragraph eleven, to resell and make a profit.

85 Paragraph Fifteen: That respondent, by its policy of maintaining resale prices and refusing to sell jobbers, wholesalers, and retailers failing to adhere to such prices, and refusing to sell to jobbers, wholesalers, and retailers selling to other jobbers, wholesalers, and retailers failing to adhere to such prices, protects and has protected the relatively higher cost and less efficient jobbers and wholesalers and retailers against the competition of the relatively lower cost and more efficient jobbers, wholesalers, and retailers, as shown in paragraph eleven.

Paragraph Sixteen: That the effect of the said price maintenance system enforced as aforesaid has been and is:

(1) To secure for the respondent, the Beech-Nut Packing Company, on the sales of the products manufactured by it, the trade of jobbers, wholesalers, and retailers, and including especially the relatively higher cost and more inefficient jobbers and the relatively higher cost and more inefficient retailers as heretofore set out and to enlist their active support and cooperation in enlarging the sale of the price maintained products manufactured by respondent to the prejudice of competing manufacturers who do not fix, require, or enforce the maintenance of resale prices upon their products.

(2) To eliminate competition in prices among jobbers,
86 wholesalers, and retailers, respectively, handling the products manufactured by respondent, thus preventing jobbers, wholesalers, and retailers, respectively, and especially the lower cost and more efficient establishments, from selling respondent's products at prices which they may deem adequate and which are warranted by their costs and selling efficiency as heretofore set out, whereby such portions of the public as require or prefer the products of the respondent are compelled to pay enhanced prices therefor.

(3) To tend to force manufacturers who do not fix, require, or enforce the maintenance of resale prices and who compete with respondent also to inaugurate, maintain, and enforce a system of resale prices upon their products in order to offset the preference of jobbers, wholesalers, and retailers, respectively, for the price maintained products of respondent, thus enabling such manufacturers as do not

now maintain such resale prices to compete upon more equal terms with the respondent, and thereby tending to compel the public generally to pay enhanced prices for the products of such competing manufacturers also.

Paragraph Seventeen: That the merchandising conduct of respondent, heretofore defined and as herein involved, does not constitute a contract or contracts whereby resale prices are fixed, maintained, and enforced.

87 Conclusions of law.

That the methods of competition set forth in the foregoing findings are under the circumstances therein set forth unfair methods of competition in interstate commerce in violation of the provisions of an act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

(Signed) WILLIAM B. COLVER,
Chairman.
VICTOR MURDOCK,
HUSTON THOMPSON,
Commissioners.

88 *Order to cease and desist.*

United States of America—Before Federal Trade Commission, ss.

At a regular session of the Federal Trade Commission, held at its office in the city of Washington, D. C., on the 30th day of June, A. D. 1919.

Present: William B. Colver, chairman; John Franklin Fort, Victor Murdock, Huston Thompson, commissioners.

FEDERAL TRADE COMMISSION
v.
BEECH-NUT PACKING COMPANY. } Docket No. 88.

The Federal Trade Commission having issued and served its complaint herein, wherein it alleged that it had reason to believe that the respondent, Beech-Nut Packing Company, has been and now is using unfair methods of competition in violation of the provisions of section 5 of an act of Congress, approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," and that a proceeding therein in respect to such alleged violation would be to the in-
89 terest of the public, and fully stating its charges in that respect, and the respondent having duly entered its appearance by Charles Wesley Dunn, its attorney, and having filed its answer, and it having been thereafter duly stipulated between the parties

that said complaint should be deemed amended in certain respects and that respondent's said answer should stand as its answer to said complaint as so amended, and the attorneys for the above parties having signed and filed an agreed statement of facts wherein and whereby it was duly stipulated and agreed that said statement of facts should be taken by the Commission in lieu of testimony herein and that the Commission might proceed upon said statement of facts to enter its report and findings as to the facts, its conclusions of law, and its order disposing of this proceeding, and the Commission on the date hereof having made and filed its report containing its findings as to the facts and its conclusions that respondent has violated section 5 of an act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," which said report is hereby referred to and made a part hereof.

Now, therefore, it is ordered, that respondent, Beech-Nut Packing Company, its officers, directors, agents, servants, and employees, cease and desist from directly or indirectly recommending, requiring, or by any means bringing about the resale of Beech-Nut products by distributors, whether at wholesale or retail, according to
90 any system of prices fixed or established by respondent, and more particularly by any or all of the following means:

1. Refusing to sell to any such distributors because of their failure to adhere to any such system of resale prices;

2. Refusing to sell to any such distributors because of their having resold respondent's said products to other distributors who have failed to adhere to any such system of resale prices;

3. Securing or seeking to secure the cooperation of its distributors in maintaining or enforcing any of such system of resale prices;

4. Carrying out or causing others to carry out a resale price maintenance policy by any other means.

By the Commission.

[SEAL.] (Signed) J. P. YODER, *Secretary.*
(Signed) EDWARD L. SMITH,
Acting Chief Counsel for the Commission.

91 United States Circuit Court of Appeals for the Second Circuit.

No. 92—October term, 1919. Argued January 19, 1920. Decided February 26, 1920. Beech-Nut Packing Company, a corporation, petitioner, *v.* Federal Trade Commission, respondent. Petition to review order of Federal Trade Commission. Before Ward, Hough, and Manton, circuit judges. Charles Wesley Dunn, for petitioner; Charles E. Hughes, of counsel; Edward L. Smith, for respondent; Claude R. Porter, Marshal B. Clark, and Joseph A. Burdeau, of counsel.

WARD, Circuit Judge.

April 15, 1918, the Federal Trade Commission issued a com-
92 plaint against the Beech-Nut Packing Company under sec. 5 of

the act of Congress of September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," charging the company with using an unfair method of competition in interstate commerce, viz, in selling its products to such purchasers, principally wholesalers and jobbers, as do not resell at a price lower than that fixed by the company and in refusing to sell to such as do, with the purpose of eliminating competition in the sale of the company's products and that a proceeding by the Commission in respect to this method would be to the interest of the public.

The company appeared and answered, admitting these facts, but denying that it had entered into any agreement with purchasers requiring them to maintain its prices or in any way qualifying their title to the articles purchased or restricting their freedom to sell to anyone and charge any price they choose.

An agreed statement of facts was filed.

June 30, 1919, the Commission filed its report and findings.

The respondent is engaged in interstate commerce in selling divers food products, such as sliced bacon, sliced beef, peanut butter, candies, chewing gum, etc., under the trade name "Beech-Nut Brand." The Commission's findings of fact are very long and it will be sufficient for the purposes of our decision to state the following:

"Paragraph Four: That respondent customarily markets its products principally through jobbers and wholesalers in the grocery, drug, candy, and tobacco lines, who in turn resell to retailers in these lines, all of which wholesale and retail dealers are selected as desirable customers for the reason that they are known or believed to be (a) of good credit standing; (b) willing to resell at the resale prices suggested by respondent and who do resell at such prices, as hereinafter set forth; (c) willing to refuse to sell and who do refuse
93 to sell to jobbers, wholesalers, and retailers who do not resell at the resale prices suggested by respondent, and who do not sell to such jobbers, wholesalers, and retailers as also hereinafter set forth; (d) good and satisfactory merchandisers in other respects. Such jobbers, wholesalers, and retailers are designated by the respondent as 'selected' or 'desirable' dealers. Respondent also sells 'direct' in a few instances to certain large retailers who are selected on the same basis as the aforesaid jobbers, wholesalers, and retailers. The total number of such dealers handling the products of respondent includes the greater proportion of the jobbers, wholesalers, and retailers, respectively, in the grocery trades and a large proportion of the jobbers, wholesalers, and retailers in the drug, candy, and tobacco trades, respectively, throughout the United States.

"Paragraph Five: That respondent, in the sale and distribution of its products, has adopted and maintained, and still maintains, policy known as the 'Beech-Nut Policy,' and requests the cooperation therein of all dealers selling the products manufactured by it, dealing with each customer separately.

"Paragraph Seven: In order to carry out said Beech-Nut policy and to secure such cooperation, respondent—

"(a) Issues circulars, price lists, and letters to the trade generally showing suggested uniform resale prices, both wholesale and retail, to be charged for Beech-Nut products.

"(b) Requests and insists that the aforesaid selected jobbers, wholesalers, and retailers resell only at the suggested resale prices.

"(c) Requests and insists that the aforesaid selected jobbers, wholesalers, and retailers sell only to such other jobbers, wholesalers, and retailers as have been and are willing to resell and do resell at the prices so suggested by the respondent; and requests and insists that such jobbers, wholesalers, and retailers discontinue selling to other jobbers, wholesalers, and retailers who fail to resell at the prices so suggested by respondent.

"(d) Makes it known broadcast to such selected jobbers, wholesalers, and retailers, whether sold 'direct' or not, that if they, or any of them, fail to sell at the resale prices suggested by the respondent as aforesaid, respondent will absolutely refuse to sell further supplies of its products to them, or any of them, and will also absolutely refuse to sell any jobbers, wholesalers, and retailers whatsoever who sell to other jobbers, wholesalers, or retailers failing to resell at the prices suggested by respondent.

"Paragraph Eight: That respondent, in the carrying out of said policy,

"(a) Has within the time aforementioned refused and does refuse to sell its products to practically all such jobbers, wholesalers, and retailers as do not resell at the prices so suggested by the respondent;

"(b) Has within the time aforementioned refused and does refuse to sell to practically all such jobbers, wholesalers, and retailers reselling to other jobbers, wholesalers, and retailers who have failed to resell at the prices so suggested by the respondent;

"(c) Has within the time aforementioned refused and does refuse to sell to practically all so-called mail-order houses engaged in interstate commerce, on the ground that such mail-order houses frequently sell at cut prices, and has within the time aforementioned refused and does refuse to sell to practically all jobbers, wholesalers, and retailers who sell its products to such mail-order houses;

"(d) Has within the time aforementioned refused and does refuse to sell to practically all so-called price cutters;

"(e) Has maintained within the time aforementioned and does maintain a large force of so-called specialty salesmen or representatives who call upon the retail trade and solicit orders therefrom to be filled through jobbers and wholesalers, which orders are commonly known in the trade as 'turnover orders'; that respondent's salesmen, under its instructions, have within the time aforementioned refused and do refuse to accept any such turnover orders to be filled through jobbers and wholesalers who themselves sell or have sold

at less than the suggested resale prices, or sell or have sold to jobbers, wholesalers, and retailers who sell or have sold at less than such suggested resale prices; and in such cases have requested such retailers to name other jobbers;

"(f) Has within the time aforementioned reinstated and does reinstate as distributors of its products jobbers, wholesalers, and retailers previously cut off or withdrawn from the list of selected jobbers, wholesalers, and retailers for failure to resell at the prices suggested by the respondent and/or for selling to distributors who do not maintain such suggested resale prices, upon the basis of declarations, assurances, statements, promises, and similar expressions, as the case may be, by said distributors, respectively, which satisfy the respondent that such distributors will thereafter resell at the prices suggested by the respondent and/or will refuse to sell to distributors who do not maintain such suggested resale prices;

"(g) Has within the time aforementioned added and does add to its list of new distributors, concerns reported by its representatives as declaring that they intend to and will resell at the prices suggested by the respondent, and/or will refuse to sell to distributors who do not maintain such suggested resale prices;

96 "(h) Has within the time aforementioned utilized a system of key numbers or symbols stamped or marked upon the cases containing 'Beech-Nut Brand' products, thus enabling the respondent, for any purpose whatsoever, to ascertain the identity of the distributors from whom such products were purchased; and that repeatedly, within the time aforementioned, when instances of price-cutting have been reported to respondent by the selected wholesalers and retailers, or ascertained in other ways, its salesmen and representatives have been instructed by respondent to investigate, and that in pursuance of these instructions salesmen and representatives of respondent have by means of these key numbers or symbols traced the price cutters from whom the goods have been obtained and have thus ascertained the identity of such price cutters, and have also thus traced and ascertained the identity of distributors from whom price cutters have purchased 'Beech-Nut Brand' products; and have thereafter refused to supply all such dealers with its products, whether such dealers were themselves cutting the suggested resale prices or were selling to dealers cutting the suggested resale prices;

"(i) Has within the time aforementioned maintained and does maintain card records containing the names of thousands of jobbing, wholesale, and retail distributors, including the aforesaid selected distributors, and in furtherance of its refusals to sell goods either to distributors selling at less than the suggested resale price, or to distributors selling to other distributors selling at less than the suggested resale prices, has listed upon those cards bearing the names of such distributors the words 'Undesirable—Price Cutters,' 'Do Not Sell,' or 'D. N. S.,' the abbreviation for 'Do Not Sell,' or expressions of a like character, to indicate that the particular distributor was

not in the future to be supplied with respondent's goods on account of failure to maintain the aforesaid suggested resale prices or
97 on account of failure to discontinue selling to dealers failing to maintain such suggested resale prices. When respondent has received declarations, assurances, statements, promises, and similar expressions, as the case may be, by said distributors, respectively, which satisfy the respondent that such distributors will resell at the prices suggested by the respondent, and/or discontinue selling to distributors failing to maintain the resale prices suggested by respondent, said respondent has issued instructions to 'Clear the record,' or directions of similar import, notation of which is made on the cards, and has thereafter permitted shipments of its products to be made to such distributors; and such distributors to whom shipments are thus allowed to go forward constitute the respondent's list of so-called 'selected' jobbers, wholesalers, and retailers, and no distributor is thus listed on such card records as one to whom goods are allowed to go forward who fails to maintain the resale prices suggested by respondent or sells to distributors failing to resell at such suggested prices; and when a jobber, wholesaler, or retailer is reported as failing to maintain the suggested resale prices, and/or as selling to distributors who fail to maintain such suggested resale prices, and has been entered in the card records as one to whom shipments should not go forward, respondent notifies those jobbers, wholesalers, and retailers who supply said distributor of this fact, and also notifies its specialty salesmen, and gives similar notices to said jobbers, wholesalers, and retailers and to its specialty salesmen when reinstatements are made in its said list of 'selected' jobbers, wholesalers, and retailers."

The Commission's conclusion of law is:

"That the methods of competition set forth in the foregoing findings are under the circumstances therein set forth unfair methods of competition in interstate commerce in violation of the provisions of an act of Congress approved September 26, 1914, entitled
98 'An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes.'"

June 30, 1919, the order under review issued as follows:

"Now, therefore, it is ordered, that respondent, Beech-Nut Packing Company, its officers, directors, agents, servants, and employees cease and desist from directly or indirectly recommending, requiring, or by any means bringing about the resale of Beech-Nut products by distributors, whether at wholesale or retail according to any system of prices fixed or established by respondent, and more particularly by any or all of the following means:

"1. Refusing to sell to any such distributors because of their failure to adhere to any such system of resale prices;

"2. Refusing to sell to any such distributors because of their having resold respondent's said products to other distributors who have failed to adhere to any such system of resale prices;

"3. Securing or seeking to secure the cooperation of its distributors in maintaining or enforcing any such system of resale prices;

"4. Carrying out or causing others to carry out a resale price maintenance policy by any other means."

The subject is one affecting the public generally and plainly within the jurisdiction of the Commission. The ground upon which the conclusion of law rests is that the method is unfair because it stifles competition and so restrains trade. The obvious purpose of the respondent is to prevent any competition as to the resale price between purchasers of its products. Such a method founded upon an agreement between a manufacturer and purchasers severally was held to be a violation of the Sherman Act in Dr. Miles Medical Co. *v.* Park & Sons Co., 220 U. S., 370. It is difficult to say
99 why a different conclusion should be reached if the same result is attained by acquiescence and cooperation without express agreement between the manufacturer and his purchasers severally, Eastern States Retail Lumber Association *v.* United States, 234 U. S., 600. But we understand the Supreme Court to hold in United States *v.* Colgate & Co., 250 U. S., 300, that a similar but less drastic method of sale constitutes merely the exercise of a man's right to do what he will with his own and is not obnoxious to the Sherman Act.

The facts as found by the Commission, being supported by testimony, are conclusive, but the effect of them is a question of law to be expressed in a conclusion of law and the Commission so describes it. We do not see how this conclusion can be sustained in face of the decision in the Colgate case.

The order is reversed.

100 **United States Circuit Court of Appeals for the Second Circuit.**

No. 92—October term, 1919. Argued January 19, 1920. Decided February 26, 1920. Beech-Nut Packing Company, a corporation, petitioner, v. Federal Trade Commission, respondent. Petition to review order of Federal Trade Commission. Before Ward, Hough, and Manton, circuit judges.

MANTON, Circuit Judge (concurring):

I concur in the result here announced and will state my reasons.

In considering the cases which arise under the jurisdiction of the Federal Trade Commission, the distinction between the Clayton Act (July 2, 1890, chap. 647, 26 Stat. 209) and the act which creates and defines the jurisdiction and duties of the Federal Trade Commission (act of Congress, Sept. 26, 1914; chap. 315, sec. 5, 38 Stat. 719),
101 must be kept in mind. The purposes of the Clayton Act and of the Federal Trade Commission act are different. The Clayton Act is intended for the prohibition of contracts and combinations in restraint of trade which are of sufficient force of oppression or coercion as amount to a monopoly or trust. In order for the Govern-

ment to succeed in an equity or criminal action, or for a private litigant to succeed, where he seeks damages as a result of such alleged trust or combination, each must successfully bear the burden of establishing a combination which restrains trade. No such obligation is imposed upon the Federal Trade Commission before its order may issue requiring an individual, partnership, or corporation engaged in commerce to desist from a practice which might lead eventually to an unlawful trust or combination which would be in restraint of trade. Section 5 of the Federal trade act prohibits unfair methods of competition in commerce, declaring them unlawful. This act forbids all unfair methods of competition. It does not define what is unfair competition, but leaves that to the Commission for determination. Section 5 provides that the Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks and common carriers subject to the acts, to regulate commerce by using methods of unfair competition in commerce. It will thus be observed that there is no restriction or qualification to the powers thus conferred, but the method of commerce must be unfair.

This legislation appears to be analogous to that provided for in the creation of the Interstate Commerce Commission. The interstate commerce act conferred the powers upon the commission to enforce any order or orders provided in the act that it might issue, and it gives to the Interstate Commerce Commission the power to issue an order to cease and desist a violation. (B. & O. R. Co. vs. Pitcairn Coal Co., 215 U. S. 481.) The Interstate Commerce Commission was created for the purpose of receiving and correcting any abuse or injustice perpetrated upon shippers by railroads or injustice to
102 the railroads. What were reasonable rates was to be determined by the commission. It was held by the Supreme Court, with respect to enjoining or setting aside the orders of the commission by the Federal courts, that authority of the courts in reviewing their determination was confined to whether there had been violations of the Constitution or of the power conferred by statute or any exercise of power so arbitrary as to virtually transcend the authority conferred. (Kansas City Ry. Co. vs. United States, 231 U. S. 423; Interstate Commerce Comm. vs. L. & N. Ry. Co., 227 U. S. 88.) The Federal Trade Commission act provides that when an order is made and it is based upon a finding of unfair competition supported by evidence it is conclusive upon the courts, and this court so held in Gratz vs. Federal Trade Commission (258 Fed. Rep. 314).

In my opinion, Congress had in mind, in this legislation, the prevention of acts which amount to unfair competition at their very inception. In this manner, the antitrust law was supplemented. To make successful either a criminal prosecution or other liability under the Clayton Act, it is necessary to find that a trust or monopoly is created which restrains trade. One act which may be an act of unfair competition may, of itself, restrain trade and may do damage to a complainant. The Federal Trade Commission act was in-

tended to reach such an unfair business method where the antitrust law could not do so. Of course, if all unfair acts were dealt with by the Federal Trade Commission, there would be no monopoly or trust created. It was intended by sec. 5 of the act to prevent practices or methods of business unfair to the public which if not prevented would grow and create monopolies, and thus restrain trade and lessen competition. In the case of Dr. Miles Medical Co. v. Park & Son (220 U. S., 373), the Supreme Court held that where the defendant successfully prevented competition by fixing resale prices between purchasers of the products of the defendant this amounted to a restraint of trade and was a violation of the
103 Sherman Antitrust Act of July 2, 1890. The only difference between the price fixing of the Dr. Miles case and the price fixing in the "Beech-Nut merchandising policy," which the Federal Trade Commission in the case at bar has found offensive as an unfair method of competition, is that in the former case there was an agreement in writing provided for, while in the latter the success or failure of the plan depended upon a tacit understanding with the purchasers and prospective purchasers. It is difficult to see any difference between a written agreement and a tacit understanding. In each case, if the agreement, written or unwritten, is not lived up to, it means that the prospective purchaser could not buy or obtain the goods he wished. This may of itself create a restraint of trade. In the case of Boston Store v. American Graphophone Co. (246 U. S., 8), speaking of the Dr. Miles case, the court said:
"it was decided that under the general law the owner of movables (in that case proprietary medicines compounded by a secret formula) could not sell the movables and lawfully by contract fix a price at which the product should afterwards be sold, because to do so would be at one and the same time to sell and retain, to part with and yet to hold, to project the will of the seller so as to cause it to control the movable parted with when it was not subject to his will, because owned by another, and thus to make the will of the seller unwarrantedly take the place of the law of the land as to such movables. It was decided that the power to make the limitation as to price for the future could not be exerted consistently with the prohibitions against restraint of trade and monopoly contained in the antitrust law" (pp. 20-21).

In the plan of the petitioner, herein called a "suggestion," which in truth is a tacit understanding, to do precisely what was done
104 in the Dr. Miles case, disobedience of the "suggestion" would result in a failure to be able to buy further from the petitioner. It has been held that the trader or manufacturer who carries on an entirely private business may sell to whom he pleases. (U. S. v. Trans-Missouri Freight Assn., 166 U. S., 290.) And this case was approved in United States v. Colgate (250 U. S., 300). However, in the Colgate case the court dealt solely with the purpose of the

antitrust act in its prohibition of monopolies, contracts, and combinations which interfere with the free exercise of the rights of a merchant to engage in trade and commerce. The court said that in the absence of any purpose to create or maintain a monopoly the act does not restrict the right of a trader or manufacturer engaged in an entirely private business freely to exercise his own independent discretion as to the parties with whom he will deal. It distinguishes the Dr. Miles case for the reason that it was found in this case there existed an unlawful combination which was affected through contracts which undertook to prevent dealers from freely exercising the right to sell. Referring to the facts in the Colgate case the court said:

"Considering all said in the opinion * (notwithstanding some serious doubts), we are unable to accept the construction placed upon it by the Government. We can not e. g. wholly disregard the statement that 'The Retailer, after buying could, if he chose, give away his puchase or sell it at any price he saw fit, or not sell it at all, his course in these respects being affected only by the fact that he might by his action incur the displeasure of the manufacturer who could refuse to make further sales to him, as he had the undoubted right to do.' And we must conclude that, as interpreted below, the indictment does not charge Colgate & Company with selling its products to dealers under agreements which obligated the latter not to resell except at prices fixed by the company."

105 In view of this recent pronouncement in the Colgate case and even accepting the finding of facts of the Commission, I think we are forced to the conclusion that the acts found and charged in the method of doing business under the "Beech-Nut merchandising policy" are not unfair methods of competition and that therefore, this court must hold, as a matter of law, that the Commission exceeded its power in making the order appealed from.

106 At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the court rooms in the post office building in the city of New York, on the 8th day of March, one thousand nine hundred and twenty.

Present: Hon. Henry G. Ward, Hon. Charles M. Hough, Hon. Martin T. Manton, circuit judges.

BEECH NUT PACKING COMPANY, A CORPORATION, PETITIONER,
v.
FEDERAL TRADE COMMISSION, RESPONDENT.

Petition to review order of the Federal Trade Commission.

This cause came on to be heard on the transcript of record from the Federal Trade Commission, and was argued by counsel.

*Opinion below.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said Federal Trade Commission be, and it hereby is, reversed.

It is further ordered that a mandate issue to the said Federal Trade Commission in accordance with this decree.

H. G. W.
M. T. M.

107 (Endorsed:) United States Circuit Court of Appeals, Second Circuit. Beech Nut Co. v. Ferderal Trade Commission. Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 8, 1920. William Parkin, clerk.

108 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 107, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Beech Nut Packing Company against Federal Trade Commission, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District of New York, in the Second Circuit, this 21st day of April, in the year of our Lord one thousand nine hundred and twenty, and of the Independence of the said United States the one hundred and forty-fourth.

[SEAL.] WM. PARKIN, *Clerk.*

109 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, greeting:

Being informed that there is now pending before you a suit in which Beech-Nut Packing Company is petitioner, and Federal Trade Commission is respondent, which suit was removed into the said Circuit Court of Appeals by virtue of a petition to review an order of Federal Trade Commission, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and re-
110 moved into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the fourth day of June, in the year of our Lord one thousand nine hundred and twenty.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

111 (Endorsed:) File No. 27,671. Supreme Court of the United States. No. 916—October Term, 1919. Federal Trade Commission vs. Beech-Nut Packing Company. Writ of certiorari.

112 In the Supreme Court of the United States, October term, 1919.

FEDERAL TRADE COMMISSION, PETITIONER,
v.
BEECH NUT PACKING COMPANY, RESPONDENT. } No. 916.

Stipulation as to return to writ of certiorari.

It is hereby stipulated by counsel for the parties to the above-entitled cause that the certified copy of the transcript of the record now on file in the Supreme Court of the United States shall constitute the return of the clerk of the United States Circuit Court of Appeals for the Second Circuit to the writ of certiorari granted therein.

ALEX. C. KING,
Solicitor General.
CHARLES WESLEY DUNN,
Counsel for Respondent.

June 5, 1920.

To the honorable the Supreme Court of the United States, greeting:

The record and all proceedings whereof mention is within made having lately been certified and filed in the office of the clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed and certified as the return to the writ of certiorari issued herein.

Dated, New York, June 10, 1920.

WM F. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

113 (Endorsed:) United States Circuit Court of Appeals, Second Circuit. Federal Trade Commission v. Beech-Nut Packing Co. Return to certiorari. Office of the clerk, Supreme Court U. S. Received June 12, 1920. (In pencil:) 329–20; 916–19; 27671.

(Indorsement on cover:) File No. 27671. Supreme Court U. S., October term, 1920. Term No. 329. Federal Trade Commission, petitioner, vs. Beech-Nut Packing Co. Writ of certiorari and return. Filed June 12, 1920.

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In the Supreme Court of the United States

OCTOBER TERM, 1919.

FEDERAL TRADE COMMISSION, petitioner, *v.* BEECH-NUT PACKING COMPANY, A CORPORATION, respondent.	No. ——.

PETITION OF THE FEDERAL TRADE COMMISSION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT.

The Solicitor General and the chief counsel of the Federal Trade Commission, on behalf of said Federal Trade Commission, pray that a writ of certiorari issue to review the decree of the Circuit Court of Appeals for the Second Circuit rendered in the above case on the 26th day of February, 1920, which decree reversed an order of the Federal Trade Commission directing respondent to cease and desist from carrying out its policy of resale price maintenance found by the commission to constitute "an unfair method of competition" within the meaning of section 5 of the Federal Trade Commission act. (38 U. S. Stat. 717.)

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A complaint, fully stating the charges against respondent, was duly filed and issued by the commission, and thereafter the defendant filed its answer, which answer was, by stipulation, allowed to stand as the answer to the amended complaint subsequently filed.

After joinder of issue an agreed statement of facts was filed (Rec. p. 11) upon which the commission based its findings of fact (p. 23), which the court below has found to be supported by the evidence and, therefore, under the act conclusive; and on June 30, 1919, the commission made and served upon the respondent its order to cease and desist (p. 38).

The so-called "Beech-Nut merchandising policy" set forth in the agreed statement of facts and the findings of the commission, and against which the order in this proceeding was directed as an unfair method of competition, embraces almost every imaginable device (except written agreements) to enforce the maintenance of resale prices, both by wholesalers and by retailers, whether vendees or subvendees of respondent. The principal features of this policy may be briefly enumerated as follows: Price lists, circulars, and letters are sent by respondent to the trade generally showing uniform resale prices established by respondent, (*a*) to be charged by wholesalers and jobbers in reselling to retailers, and (*b*) to be charged by retailers in reselling to the consuming public (p. 15), and also showing the gross profit margins which these prices will yield to whole-

salers and retailers. Respondent constantly urges all distributors of its products to "take the full profit" afforded by such prices (p. 22); and all distributors, whether buying direct or through others, are told by respondent not only that they themselves must observe these resale prices, but that they must discontinue selling to all other distributors, whether wholesale or retail, who have failed to observe the same (p. 15). Respondent refuses to sell to, and all supplies are cut off from, all distributors who transgress either of these rules. (P. 16.) That is to say, a wholesaler if he wishes to continue to handle Beech-Nut products, must not only resell them at the prices specified by respondent but must discontinue selling *even at those prices* to any retailer selling to consumers at prices other than those prescribed by respondent. As this rule applies to all wholesalers, the offending retailer is effectually prevented from getting these goods *from any source whatever*, and the wholesaler, although he has observed the resale prices, loses his retail customer whose orders he is precluded from filling, even though under contract to do so, on pain of losing his own supplies. In the same way respondent cuts off all supplies of its products from *mail order houses* by refusing to sell to them directly and by refusing to sell to those who supply such organizations. (P. 16.) Orders received by respondent's "specialty" salesmen from retailers to be filled by a jobber designated by the retailer are diverted by respondent to other jobbers, in case the first-named jobber has failed to observe

respondent's resale price policy, either by selling at prices other than those prescribed, or by selling to retailers who have failed to observe such resale prices. (P. 16.) As a further aid to carrying out this policy, respondent maintains an elaborate system of card records containing the names of jobbing wholesale and retail distributors throughout the country, and indicates therein those distributors, whether at wholesale or retail and whether sold direct or not, to whom its goods are not to be sold, for either or both of the reasons above referred to relating to resale price maintenance. Distributors supplying such dealers are notified when the latter have been entered in these records as "undesirable price cutters," etc., and respondent's "specialty" salesmen are also notified. In this way offending distributors are cut off from getting supplies of respondent's products from other distributors, and orders intended for them are diverted to other distributors in good standing. (P. 19.)

As another means of maintaining and enforcing its resale prices upon the trade, respondent was shown to have employed a species of espionage by which it was enabled to trace, through so-called "key numbers" stamped on the boxes, goods purchased by one distributor from another, and the information thus obtained was used to enable respondent to cut off the supplies of all distributors failing to observe its price-maintenance policy. (P. 17.)

Respondent also constantly seeks and secures the cooperation of the distributors of its products in carrying out its merchandising policy; it requests such distributors to report the names of competing distributors who have failed to observe the resale prices, and, acting on such information, cuts off the supplies of such competitors by refusing to sell them directly and by notifying jobbers and wholesalers not to sell them. (P. 14.) From time to time new distributors have been added to respondent's "selected" list, and others, previously cut off, have from time to time been reinstated and allowed to purchase the respondent's products; such additions and reinstatements being made as the result of declarations, assurances, or promises received from such distributors which have satisfied respondent that the new or reinstated distributor will resell only at the designated prices and refuse to resell to others not observing such prices. (P. 19.)

The commission found the effects of this system to be (*a*) the elimination of all competition in prices among distributors of Beech-Nut products, both at wholesale and at retail; (*b*) the consequent enhancing of the prices required to be paid for such products by the consuming public; and (*c*) the tendency to compel manufacturers of competing products to enforce the maintenance of resale prices in order to secure adequate distribution of their products, and to overcome the preference of wholesale and retail distributors for handling respondent's products, by

reason of the added profits secured through such elimination of competition. (P. 36.)

The Circuit Court of Appeals, in reversing the order in this case, said of the merchandising policy above outlined:

> The obvious purpose of the respondent is to prevent any competition as to the resale price between purchasers of its products. Such a method founded upon an agreement between a manufacturer and purchasers severally was held to be a violation of the Sherman Act in *Dr. Miles Medical Co.* v. *Park & Sons Co.* (220 U. S. 370). It is difficult to say why a different conclusion should be reached if the same result is obtained by acquiescence and cooperation without express agreement between the manufacturer and his purchasers severally. (*Eastern States Retail Lumber Association* v. *U. S.* 234 U. S. 600.) But we understand the Supreme Court to hold in the *U. S.* v. *Colgate & Co.* (250 U. S. 300) that a similar but less drastic method of selling constitutes merely the exercise of a man's right to do what he will with his own and is not obnoxious to the Sherman Act.

And the court concludes:

> The facts as found by the commission, being supported by testimony, are conclusive, but the effect of them is a question of law to be expressed in a conclusion of law, and the commission so describes it. We do not see how this conclusion can be sustained in face of the decision in the Colgate case.

QUESTIONS INVOLVED.

It is respectfully urged that the petition for certiorari should be granted for the following reasons:

First. That the court erred in holding that the Colgate case is conclusive against the commission on the question of unfair competition.

Second. That the court overlooked the fact that a practice may be within the prohibition of section 5 of the Federal Trade Commission act as an unfair method of competition, even though not necessarily involving a contract or combination in restraint of trade under the Sherman Act.

Third. That it is desirable, owing to the large number of cases pending before the commission involving this question, that it should be finally passed upon by the Supreme Court.

Fourth. An order of the Federal Trade Commission, based upon a finding of unfair competition, supported by evidence, is conclusive upon the courts, as to the existence of such unfair competition.

Fifth. That this respondent has indulged in practices to enforce its price maintenance policy which are clearly unfair, and which were not present in the Colgate Case, including:

(1) The practice of refusing to sell to price-maintaining distributors because of their selling to others not maintaining prices. (Stip. of fact, par. 6 b.)

(2) The practice of notifying distributors of the fact that a dealer's name has been placed by respondent on its "Undesirable" and "Do not sell" list for cutting prices or selling to price cutters (Stip. par. 6 i, fols. 54, 57), and refusing to sell to all distributors

who supply the offending dealer with goods after receipt of such notification (Stip. par. 8).

(3) The practice of requiring assurances and promises as to resale price maintenance from subvendees with whom respondent has no direct dealings, before placing their names on the "Selected" list to enable them to purchase "Beech-Nut" products from the trade. (Stip. par. 6 f–6 i, fol. 55.)

(4) The practice of requesting and insisting that price-maintaining distributors *shall discontinue selling* to other distributors who fail to observe the resale prices. (Stip. par. 5 c.)

(5) The practice of diverting "turn-over" orders (obtained by petitioners' salesmen from retail dealers) from one jobber to another because of the former having sold at other than the established prices, or having sold at those prices to dealers who had failed to observe them. (Stip. par. 6 e.)

(6) Tracing by means of so-called "key numbers" the identity of distributors failing to observe the resale prices or selling to others so failing, in order to enable respondent to cut off the supplies of such distributors. (Stip. 6 h.)

(7) The practice of systematically refusing to sell not only to all mail-order houses but to all distributors supplying such establishments. (Stip. par. 6 c.)

Wherefore it is respectfully submitted that the writ should issue as prayed.

ALEX. C. KING,
Solicitor General.

CLAUDE R. PORTER,
Chief Counsel for the Federal Trade Commission.

BRIEF IN SUPPORT OF PETITION.

I.

The Circuit Court of Appeals Erred in Holding the Colgate Case to be Controlling.

After the decision of the Supreme Court of the United States in the Dr. Miles Medical Co. case in 1911 (220 U. S. 373) attempts on the part of manufacturers to bind distributors of their products to the observance of resale prices by means of restrictive contracts were generally abandoned, and, as a substitute, the practice was widely adopted of indicating resale prices and cutting off the supplies of dealers not observing such prices. This substitute method of price maintenance was enforced by different manufacturers in various ways and by various devices, some much more drastic than others, but they all resembled each other in the fact that no contracts were used.

In 1914 the Federal Trade Commission act was passed declaring "unfair methods of competition" to be unlawful, and empowering and directing the commission to prevent the use of such methods; and the commission has, under that law, instituted a large number of proceedings directed against these new price maintenance schemes, as being in violation of section 5 of the Federal Trade Commission act, i. e., as involving an unfair method of competition both as regards competitiors, dealers, and the consuming public; and many orders to cease and desist have been issued by the commission, directed against these practices, and are now outstanding.

It is, therefore, most important to the commission that this question of the legal status of these new price-maintenance schemes should be passed upon on its merits *from the point of view of unfair competition* rather than from the point of view of combinations in restraint of trade under the Sherman Act or decisions concerning that act. Before this question could be brought before the court, however, Colgate & Co., a corporation, was indicted in the District Court of the United States for the Eastern District of Virginia for unlawfully engaging in a combination, *in violation of section 1 of the Sherman law*, with wholesale and retail dealers to procure adherence by such dealers to resale prices fixed by Colgate & Co., and to prevent such dealers from selling at lower prices; that is to say, the Colgate indictment charged that, by reason of the particular facts therein alleged (which facts differed materially from those in the present case, as will hereafter appear), that corporation had been guilty of creating and engaging in a combination with such wholesale and retail dealers, in restraint of trade and commerce among the several States.

When the case reached the Supreme Court (250 U. S. 300) that court affirmed the judgment of the District Court, sustaining a demurrer to this indictment on the ground that the said court had construed the indictment as not charging any agreement or combination, express or implied, between Colgate & Co. and their vendees as to resale prices; that the Supreme Court was bound by the construction placed

on the indictment by the lower court in determining whether it charged an offense under the Sherman Act; and that, accepting such construction, it only showed a refusal to sell by Colgate & Co. in the exercise of its own will and not an agreement or combination with others to affect resale prices. Hence, no violation of the antitrust act was charged. This is made clear by the explanation of the Colgate & Co. case in the opinion in *United States* v. *Schrader & Co.* (U. S. S. C. op. Mar. 1, 1920). In both the Colgate & Co. and Schrader cases the Supreme Court approved the decision in the Dr. Miles Medical Co. case, supra, where the court had previously held that it was the *system of contracts* entered into by the Dr. Miles Medical Co. with its wholesale and retail distributors that *created the combination* in violation of the Sherman law. In the Colgate & Co. case Justice McReynolds cited the Dr. Miles Medical Co. case as holding that the unlawful combination *was effected through contracts;* and in the recent Schrader case (decided Mar. 1, 1920) the same justice, speaking for the court, has again pointed out the distinction, *under the Sherman law,* between contract cases like the Dr. Miles case and noncontract (either express or implied) cases, such as the Colgate case, saying that in the former an illegal combination exists *because of the contracts,* whereas in the latter, in the absence of contracts, no combination exists.

It is evident that all of these decisions discussed this subject *in terms of combination,* and that none of them touches, or could touch, the question in terms

of *unfair methods of competition*, because no violation of the Federal Trade Commission act was or could be involved under the Sherman law indictment.

As a merchandising policy may clearly constitute an unfair method of competition under the Federal Trade Commission act, although it does not involve an unlawful combination under the Sherman law, it follows that the decision in the Colgate case can not be a controlling authority in determining the validity of the finding and order of the Federal Trade Commission in the present proceeding to the effect that the merchandising policy of the Beech-Nut Packing Co. is an unfair method of competition; and the court below was in error in disposing of this case and reversing the commission's order on the authority of the Colgate case.

Judge Manton, of the Circuit Court of Appeals, in his concurring opinion below, has clearly pointed out the distinction between the provisions of the Federal Trade Commission act and those of the Sherman law (inadvertently referred to as "Clayton Act"). Among other things, he said: "The Federal Trade Commission act was intended to reach such an unfair business method where the antitrust law could not do so."

Yet, quite inconsistently, it would seem, he concludes that because the antitrust laws can not reach the practice involved in this case as a combination in restraint of trade, therefore it can not be reached under the Federal Trade Commission act as an unfair method of competition. It is submitted that this

view unduly narrows the field of the Federal Trade Commission, and loses sight of one of the legislative purposes which inspired the passage of that act, namely, to supplement the antitrust laws and to reach in their inception unfair practices which, in and of themselves, could not be reached by those laws.

The power of Congress to regulate interstate commerce is unlimited, except by the express provisions of the Constitution. It is not denied that the business of the Beech-Nut Co. is interstate commerce, and hence the extent and manner of the regulations by Congress are limited only by the legislative discretion.

The Federal Trade Commission act, enacting, as it does, new and important substantive law in relation to methods of competition, should be construed in the light of its own clear provisions, and the purposes sought to be accomplished, and should not be limited in its scope, as the result of supposed analogies with the antitrust laws.

II.

The facts stipulated fully support the finding that respondent's practices constitute unfair competition within the meaning of section 5 of the Federal Trade Commission act.

The following preliminary considerations are to be borne in mind in a case involving the status of resale price maintenance schemes as "unfair methods of

competition" under the Federal Trade Commission act:

1. Section 5 of the act provides:

> That unfair methods of competition in commerce are hereby declared unlawful. The commission is hereby empowered and directed to prevent persons, partnerships or corporations * * * from using unfair methods of competition in commerce. Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon said person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed, at least thirty (30) days after the service of said complaint.

2. The United States Circuit Court of Appeals for the Second Circuit has already held that the unfair methods of competition prohibited by the Federal Trade Commission act are not restricted to such as violate the antitrust acts. (*Federal Trade Commission* v. *Gratz*, 258 Fed. R. 314, 316.) And it is submitted that such is a proper construction of section 5 of the Federal Trade Commission act. It is not necessary, therefore, in order to sustain orders of the commission issued under this act, to establish that the unfair methods of competition sought to be pre-

vented violate either the Sherman law or the Clayton Act, or that they constitute contracts, combinations, or conspiracies in restraint of trade.

3. It is further to be noted that the order of the commission in the present case is not aimed at isolated instances of unfair competition employed by the respondent merely against certain individuals, but is directed, in the public interest, against a general scheme of merchandising which destroys all competition in the sale of respondent's products both among all jobbers and wholesalers as a group on the one hand, and among all retailers as a group on the other; and is detrimental to the public generally by reason of the enhanced prices which result from such elimination of competition.

4. Again, the order does not seek to interfere with the right of a manufacturer, in the ordinary course of his business, to select his own customers, "In *bona fide* transactions and not in restraint of trade"; but is aimed at the abuse of said right of selection for the purpose of furthering a general policy to accomplish a purpose detrimental to the public interest, viz, the suppression of competition in, and the enhancement of prices for, products for which there is a great demand on the part of the consuming public and by the customers which it has selected and to which it has sold its goods.

5. Neither does the order in this case seek to compel the respondent, against its will, to sell its products to any person, partnership, or corporation; but merely to desist, where it has found a customer

otherwise acceptable, from predicating its willingness to sell upon illegal conditions, and to desist from coercing dealers, whether at wholesale or at retail, to forego their right to give the public the benefit of an open market, governed by free and fair competition, where prices shall be determined by trade conditions at the time of sale and not dictated in advance by the manufacturer.

It is settled by the decisions of the Supreme Court that a system of contracts between a manufacturer and wholesale and retail merchants fixing the prices at which the former's products shall be resold by such dealers, whether vendees or subvendees, is injurious to the public interest, and void. (*Dr. Miles' Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373.)

It is equally well settled that it is against the public interest for the owner of a copyrighted production or a patented article to attempt to fix resale prices either by contracts or by notices attached to copies of the production or to the patented article.

Bobbs-Merrill Co. v. *Strauss* (210 U. S. 339).

Bauer v. *O'Donnell* (229 U. S. 1).

Strauss v. *Victor Talking Machine Co.* (243 U. S. 490).

Boston Store v. *American Graphaphone Co.* (246 U. S. 8).

It is also submitted that all of these practices are, under the terms of section 5 of the Federal Trade Commission act, "Unfair methods of competition," and that this commission would have full and complete jurisdiction to prevent such practices.

In the present case the facts show beyond any doubt just as clear an attempt to control resale prices against the public interest as was shown in any of the above cases. The means only have been changed. It is the announced purpose and intent of this respondent to market its products only in such a way that they shall reach the consumer, through the channels of distribution, at prices fixed and established in advance by respondent; a great demand having been created for its goods, and it having become a practical necessity for all distributors to handle them, respondent takes advantage of the situation to dictate to all distributors the terms at which, and in some instances the persons to whom, they shall sell goods which they own and have paid for. We thus have the same results which have caused restrictive contracts as to resale to be denounced by the courts as injurious to the public interest.

Bearing in mind that the Federal Trade Commission act was passed 24 years after the passage of the Sherman law and 3 years after the decision of the Dr. Miles Medical Co. case, and that in the meantime the practice of resale price maintenance here involved has been largely substituted for the restrictive agreements condemned by the last-named decision, and that the Federal Trade Commission act enacts new and substantive law and condemns *all unfair methods of competition*, under every form and guise, it is submitted that this practice stands condemned as an

unfair method of competition, and therefore unlawful, and that the commission acted clearly within its power under the act in making the order sought to be reviewed herein.

The court below, however, instead of giving this great remedial statute the full effect which it clearly is entitled to, has by its decision practically taken the position that the Federal Trade Commission act has not changed or advanced the state of the law as it existed at the time of the passage of the Sherman law, and although holding "the obvious purpose of the respondent is to prevent any competition as to the resale price between purchasers of its products," has reversed this order solely on the ground that the facts disclosed would not sustain an indictment for a combination in restraint of trade under the Sherman law, under the Circuit Court of Appeals' construction of the Colgate & Co. case.

III.

The Right to Refuse to Sell.

The order in this case is not directed merely against respondent's practice of refusing to sell its products to certain dealers.

The commission recognizes that any manufacturer may, in the *ordinary course of business*, refuse business relations with any dealer where there is no intent thereby to accomplish any illegal purpose detrimental to the public interest.

The order of the commission is directed, generally, against the "bringing about the *resale* of Beech-Nut

products *according to any system of prices fixed or established by respondent.*" (See Order, Record, p. 39.)

It is *as a part of this illegal scheme* that the respondent's refusal to sell was condemned and prohibited. The commission has found that the purpose and intent of respondent's scheme, *as a whole*, is the enforced maintenance of resale prices. (Findings, par. 6.) The court below has held that the findings of the commission are supported by evidence. They are, therefore, conclusive under section 5 of of the Federal Trade Commission act. The language of the order is expressly limited to refusals on the part of respondent to sell to dealers because of their failure to adhere to this system of resale price maintenance.

In making this prohibition, the commission has only exercised the power, recognized by the Supreme Court, "which must be exercised in every case where the courts are called upon to determine whether particular acts are invalid which are, abstractly speaking, in and of themselves valid, but which are asserted to be invalid because of their direct effect upon interstate commerce." (See Standard Oil Case, 221 U. S., 70.)

That the purpose and intent may render otherwise innocent acts or practices illegal under the Sherman law is well established. (*Swift & Co.* v. *U. S.*, 196 U. S., 375; *U. S.* v. *Terminal R. R. Ass'n of St. Louis*, 224 U. S., 383; *U. S.* v. *Union Pacific R. R. Co.*, 226 U. S., 61.)

In the Swift case the court said:

> The scheme as a whole seems to us to be within the reach of the law. The constituent elements, as we have stated them, are enough to give the scheme a body and, for all that we can see, to accomplish it. Moreover, whatever we may think of them separately when we take them up as distinct charges, they are alleged sufficiently as elements of the scheme. It is suggested that the several acts charged are lawful and that intent can make no difference. *But they are bound together as parts of a single plan. The plan may make the parts unlawful.*

It is also a well-settled principle established by the antitrust decisions that the mere form in which a scheme to suppress competition is consummated is unimportant. If it have the forbidden effect (or may have it), it is condemned by the law.

> If it (the restraint of trade) be both direct and undue, no disguise will save it; courts will search for the substance and the actual effect of the transaction, and, if trade be unlawfully restrained thereby, will grant the needful relief. (*U. S.* v. *Keystone Watch Case Co.*, 218 Fed. 502.)
>
> The Sherman Act is not aimed alone at contracts, but embraces combination schemes of any and every kind which amount to an undue or unreasonable restraint of trade in interstate commerce, "without regard to the garb in which the acts were clothed." Indirection will not afford escape. (*U. S.* v. *Kellogg Toasted Corn Flake Co.*, 222 Fed. 725, 731.)

It is clear that petitioner's practice of refusing to sell its products to all distributors who fail to observe its resale prices as well as all distributors who sell to others who fail to observe such prices, is but a part of a general scheme, the purpose of which is to establish and maintain uniform resale prices throughout the trade.

IV.

Respondent's practice of enforcing the maintenance of resale prices is unfair to its competitors

It is admitted by respondent and stipulated in the record (Stip. par. 7) that jobbers and wholesale dealers generally prefer to handle and push respondent's goods rather than those of competing manufacturers who do not suggest or maintain resale prices.

It is obvious that this preference and partiality on the part of dealers in favor of respondent's goods, on which no price competition is permitted, is a distinct handicap to other manufacturers who sell similar products through the regular channels of distribution, but take no steps to "protect" dealers against price competition. There are always dealers who are unable to meet such competition either by reason of excessive overhead expense or their own inefficiency, or both. Such dealers are enabled to stay in business at all largely as a result of price-maintenance schemes such as that of this respondent. Naturally they favor the price-maintained article and neglect to push, or refuse to handle, other brands on which they must meet competition.

As a result, the manufacturer of the nonprice-maintained article is thus placed at a disadvantage in marketing his goods. There are only two ways for him to avoid this condition. He must either establish his own selling agencies throughout the country, or take steps to enforce the maintenance of resale prices on his products in order to secure the efficient services of the distributors handling them. In either case the public pays the bill. Thus price maintenance by one manufacturer means in the end price maintenance by all and a general rise in prices.

V.

An order of the Federal Trade Commission based upon a finding of unfair competition, supported by evidence, is conclusive upon the courts.

The entire substantive and procedural law involved in this case is contained in section 5 of the Federal Trade Commission act. (38 U. S. Stat. 717.) A reading of the procedural part of the section will at once disclose the evident purpose of Congress to make the practice of the Federal Trade Commission conform substantially in all respects to that of the Interstate Commerce Commission, including the review of their orders by the Circuit Court of Appeals and this court. (34 U. S. Stat. 584, 589.) This is also evidenced by the debates in Congress when the Federal Trade Commission act was pending in the Senate. (Cong. Rec., 2d Sess., 63d Cong., pp. 11084, 11103–11104, 13045–13046, 13046–13048, 13049–13051.)

It would therefore seem that the decisions of this court on matters of procedure and jurisdiction to review the orders of the Interstate Commerce Commission would be decisive of like questions under the Federal Trade Commission act.

It appears to be well settled that questions of "reasonableness" or "unreasonableness," of "just" or "unjust," as applied to railroad rates are not questions of law, but questions of fact calling for the exercise of discretion by an administrative body.

Illinois Central R. R. Co. v. *Interstate Commerce Commission* (206 U. S. 441, 455).

Pennsylvania R. R. Co. v. *International Coal Co.* (230 U. S. 184, 196).

Mitchell Coal Co. v. *Pennsylvania R. R. Co.* (230 U. S. 247, 257, 259).

Pennsylvania Company v. *United States* (236 U. S. 351, 361).

Manufacturers Ry. Co. v. *United States* (246 U. S. 457).

If questions of "reasonableness" or "unreasonableness," as applied to railroad rates, are questions of fact to be conclusively determined by the Interstate Commerce Commission, it would also seem that "whether a method of competition" is fair or unfair is a question of fact which is to be conclusively determined by the Federal Trade Commission.

It has been uniformly held by this court since the amendment of 1906 to the Interstate Commerce law that the nonreparation orders of that commission based upon findings of fact supported by evidence are conclusive upon the courts in all cases,

except (*a*) where a constitutional right is involved; (*b*) where the action of the commission was beyond its delegated authority; or (*c*) where the action of the commission was entirely arbitrary.

The case of *United States* v. *Louisville & Nashville Railroad Company,* 235 U. S. 314, is a case fairly illustrative of the proposition that the correctness of a ruling of the Interstate Commerce Commission as to whether under a certain state of facts certain rates amounted to a preference or discrimination is conclusive and can not be set aside simply because the court might be of different opinion as to the same state of facts. In commenting upon this question, Chief Justice White said (p. 320):

> The commerce court, finding that there was no conflicting or disputed evidence concerning the origin and character of the reshipping privilege, concluded that whether such privilege was an undue preference was not a matter of fact but a question of law upon which it was its duty to reach an independent conclusion. The court, therefore, among other considerations because the privilege was of long standing and was justified by water competition in Nashville, declared it to be not unlawful and not preferential. A peremptory injunction was allowed, restraining the enforcement of the order of the commission. And the correctness of this action is the question here for decision.
>
> In view of the doctrine announced in *Interstate Com. Com.* v. *Illinois Cent. R. R.* (215 U. S. 452); *Interstate Com. Com.* v. *Delaware,*

L. & W. R. Co. (220 U. S. 235); *Interstate Com. Com.* v. *Louisville & Nashville R. R.* (227 U. S. 88), it plainly results that the court below, in substituting its judgment as to the existence of preference for that of the commission on the ground that where there was no dispute as to the facts it had a right to do so, obviously exerted an authority not conferred upon it by the statute * * *. It can not be otherwise, since, if the view of the statute upheld below be sustained, *the commission would become but a mere instrument for the purpose of taking testimony to be submitted to the courts for their ultimate action.*

This same doctrine is also announced in the following cases:

Interstate Com. Com. v. *Illinois Central R. R. Co.* (215 U. S. 452, 470–478).

B. & O. R. R. Co. v. *Pitcairn Coal Co.* (215 U. S. 481, 493).

I. C. C. v. *C., R. I. & P. Ry. Co.* (218 U. S. 88, 110).

Procter & Gamble v. *United States* (225 U. S. 282, 297–298).

I. C. C. v. *L. & N. Ry. Co.* (227 U. S. 88, 92).

K. C. So. Ry. v. *United States* (231 U. S. 423, 439).

United States v. *L. & N. Ry. Co.* (235 U. S. 314, 320).

Pennsylvania Company v. *United States* (236 U. S. 351, 361).

Manufacturers' Ry. Co. v. *United States* (246 U. S. 457, 481–482).

It is therefore maintained that as the findings of the commission are supported by the evidence, the facts having been agreed upon and stipulated, and the commission having found therefrom the ultimate fact—that the respondent's distribution policy was "unfair"—the Circuit Court of Appeals should not have substituted for this finding its own opinion that these undisputed facts were not "unfair competition," there being no question in this case that a constitutional right was involved; that the order was beyond the scope of the commission's delegated authority; or that the commission acted in an arbitrary manner.

VI.

The facts of this case differ materially from those in the Colgate case.

Even if the Colgate & Co. case would prevent the Federal Trade Commission from requiring an identical method to be discontinued as "unfair competition" because not violative of the antitrust statutes, there are many practices employed by this respondent to enforce its resale prices throughout the trade and to the ultimate consumer which were not present in the Colgate case. The court below has merely alluded to this difference in the cases by referring to the Colgate merchandising scheme as a "less drastic method of sale."

These additional practices, peculiar to this case, are enumerated in the petition herein. They are themselves sufficient to brand the "Beech-Nut

policy" as an unfair method of competition. Perhaps the most "drastic" of these practices is that of systematic boycott, for failing to observe resale prices, of retail dealers with whom respondent has no direct dealings but who buy their supplies of Beech-Nut products from the jobbers. One of the purposes of the whole scheme has been found by the commission to be to prevent the jobbers from selling to such retail dealers. (Findings, par. 6.) Respondent "aids and abets" the reporting to it by the retail dealers of all instances of price cutting on the part of their competitors; and when reported, the offending dealer is *blacklisted* by respondent (par. 8 i) and all jobbers who supply him *are notified of that fact* (id.) and are urged *to discontinue selling* to him.

In this case, by the *joint action* of the respondent, the competing retailer, and the jobber, a general "embargo" is established against dealers whose only offense is that they have disposed of their own goods at prices satisfactory to themselves. Such a combination directed against a so-called price cutter is illegal at common law. *Brown & Allen* v. *Jacobs Pharmacy Co.* (115 Ga. 429).

It is evident that the respondent's part in such transactions is more than merely declining business relations with certain dealers. It consists of affirmative acts of aggression aimed at retailers with whom respondent has no business relations whatever. It is done to "protect" the competitors of the price-cutting retailer, as such competitors will not maintain prices unless they receive such "protection."

To accomplish this respondent (*a*) blacklists the offending retail dealer; (*b*) notifies the jobber that these dealers have been blacklisted; (*c*) "requests and insists" that the jobbers cease selling to such retailer; (*d*) blacklists all jobbers who continue to sell these retailers; (*e*) notifies the trade not to sell such jobbers; and (*f*) cuts off the supplies of all who refuse to comply.

This not only deprives the offending retailer of the opportunity to purchase Beech-Nut products anywhere in the United States (unless they get their names removed from the black list by promising to observe the established prices); it also results in the jobber losing a customer satisfactory to himself and with whom he may be under contract to deliver Beech-Nut goods. In short, instead of respondent being content to "select its own customers," it insists on taking part in the selection of the customers of all its jobbing distributors.

Such a method as this bears little resemblance to that of a manufacturer who "merely indicates his wishes concerning prices and declines further dealings with all who fail to observe them," to quote from the opinion in the Schrader case, explaining the Colgate decision. Much more closely does it resemble the methods declared unlawful in the Eastern Retail Lumber Dealer case (234 U. S. 600), where black lists were circulated in aid of a scheme on the part of retail dealers to boycott all wholesalers who sold direct to consumers.

Space will not permit the discussion here of the other practices peculiar to this case, as set forth in the petition, including the diversion by respondent of retailer's orders from one jobber to another, the tracing of goods by the key-number system in order to ascertain the source of supply of price cutters, and other practices. They are all fully described in the stipulation of facts and in the findings of the commission.

If, as was said in the Dr. Miles Medical Co. case, "The complainant (respondent) having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic," it is evident that this respondent has left no stone unturned to prevent the public getting that advantage in purchasing Beech-Nut products.

ALEX. C. KING,
Solicitor General.
CLAUDE R. PORTER,
Chief Counsel,
Federal Trade Commission.

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In the Supreme Court of the United States

OCTOBER TERM, 1921.

FEDERAL TRADE COMMISSION, PETITIONER,
v.
BEECH-NUT PACKING COMPANY, RESPONDENT. } No. 47.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE PETITIONER.

I.

THE NATURE OF THE PROCEEDINGS.

This case comes to this court on a writ of certiorari issued on June 1, 1920, to review a judgment of the Circuit Court of Appeals for the Second Circuit, rendered on March 8, 1920, which judgment reversed and set aside an order of the Federal Trade Commission issued on June 30, 1919, requiring the respondent, the Beech-Nut Packing Company, a New York corporation engaged in the manufacture and sale throughout the United States of food products, under the "Beech-Nut Brand," to *cease and desist*

from carrying out its plan of resale price maintenance (the so-called "Beech-Nut Merchandising Policy"), found by the Commission to constitute "*an unfair method of competition*" within the meaning of section 5 of the Federal Trade Commission Act (38 U. S. Stat., 719).

The material portion of the Commission's order is as follows:

> Now, therefore, it is ordered that respondent, Beech-Nut Packing Co., its officers, directors, agents, servants, and employees, cease and desist from directly or indirectly recommending, requiring, or by any means bring about the resale of Beech-Nut products by distributors, whether at wholesale or retail, *according to any system of prices fixed or established by* respondent, and more particularly by any or all of the following means:
>
> 1. Refusing to sell to any such distributors because of their failure to adhere to any such system of resale prices;
>
> 2. Refusing to sell to any such distributors because of their having resold respondent's said products to other distributors who have failed to adhere to any such system of resale prices;
>
> 3. Securing or seeking to secure the cooperation of its distributors in maintaining or enforcing any such system of resale prices;
>
> 4. Carrying out or causing others to carry out a resale price-maintenance policy by any other means. (Rec. p. 44.)

No question has been raised by the respondent as to the sufficiency of the pleadings or the regularity of the procedure adopted by the Commission, which resulted in this order.

The issues were submitted to the Commission for its decision, *upon an agreed statement of facts*, under a stipulation of counsel providing that such statement of facts should be taken by the Commission *in lieu of testimony*, and that the Commission might forthwith proceed thereon to make its report and findings as to the facts, its conclusion of law, and its order disposing of the proceeding (p. 29). In accordance with this stipulation, the Commission did, after due consideration, make and file its report containing its findings and conclusion (p. 35) and issued its order to cease and desist, as above set forth (p. 43).

II.

THE FACTS AS STIPULATED.

The Beech-Nut Packing Company is engaged in the manufacture and sale on a large scale, of food products, confectionery, and chewing gum in interstate commerce. It sells its products to wholesalers and jobbers, who in turn sell to the retail trade. The company also sells direct to certain large retailers. The magnitude of the business is evidenced by the admitted fact that the total number of dealers handling its products includes the *greater* proportion, respectively, of *all* the jobbers, wholesalers, and retail-

ers in the grocery trade of the United States, and a large proportion, respectively, of all the jobbers and retailers in the drug, candy, and tobacco trades. Its output is sold under the so-called "Beech-Nut Merchandising Policy," against which this order is directed, as set forth in detail in the agreed statement of facts (pp. 29–35) and in the findings of the Commission (pp. 36–43). This policy or system of selling embraces many effective devices *to enforce the maintenance of resale prices*, fixed and established by respondent on all its various products, to be observed not only by the wholesale jobbers, to whom it sells, but also by retail dealers to whom (with some exceptions) it does not sell or contract with. It binds in a price maintenance system vendees, sub-vendees, and all subsequent vendees until the product reaches the consumer.

The principal features of the scheme are the following: Respondent sells its products, with few exceptions, only to jobbers and wholesale dealers, who sell to the retail dealers, who, in turn, sell either to other vendees or generally to the consuming public (p. 37). Price lists, circulars, and letters are sent *to the trade generally*, throughout the country, showing respondent's uniform resale prices, (*a*) to be charged by the jobber or wholesale dealer in reselling respondent's products to the retailer, and (*b*) to be charged by the retailer in reselling to the consuming public (p. 38); and also showing the *gross profit margins* which these prices will yield to wholesalers

and retailers, respectively (p. 42); and all distributors, whether at wholesale or at retail, i. e., whether they procure their supplies from respondent or from its vendees, are constantly urged by respondent to *take the full profit* afforded them by these resale prices (p. 42); and all distributors are told not only that they themselves must observe the resale prices established by respondent but that they *must discontinue selling*, and they are requested to discontinue selling, to all other distributors and retailers who have failed to observe such prices (p. 38).

Respondent *makes it known broadcast* to all its so-called "selected" jobbers, wholesalers and retailers, without regard to whether they buy their goods directly from respondent or from any other dealers, that if they, *or any of them*, fail in any instance to sell such goods at the retail prices suggested by it, it will *absolutely refuse* to sell further supplies to them, or any of them, and will prevent any of them from getting their supplies elsewhere by refusing to sell to any jobber, wholesaler or retailer who sells to other jobbers, wholesalers or retailers failing to resell at the price suggested by respondent (p. 38).

In accordance with this announcement, and in *carrying out its said policy*, respondent has refused and does refuse to sell its products to practically all jobbers, wholesalers, and retailers who have failed to observe its established and suggested resale prices, and to practically all such distributors *who have resold to other distributors* who, in their turn, have failed to observe and maintain such prices

(p. 38). That is to say, a jobber or wholesale dealer handling respondent's products must, if he wishes to continue handling them, not only resell them at the prices fixed by respondent, but must *discontinue selling, even at those prices*, to all retail dealers (or, for that matter, to all other jobbers or wholesale dealers) who have resold the goods at prices other than those prescribed by respondent. In this way, all dealers failing to cooperate in the scheme, either by themselves selling to other dealers at prices lower than those designated, or by reselling at lower prices to the public, are effectually prevented from getting Beech-Nut products from any *source whatever*, and all jobbers and wholesale dealers, even though they have themselves observed the resale prices, *lose their retail customers* whose orders they are precluded from filling, *even though under contract to do so*, on pain of losing their own supplies. In this fashion all prices—from manufacturer to consumer, are effectually controlled and maintained. When any retailer is dropped from the "selected" list for price cutting, the respondent notifies the trade and automatically a boycott of the recalcitrant retailer becomes effective. Failure to join in such boycott results in the offender himself being boycotted. In the same way, respondent effectually cuts off all supplies of its products from mail-order houses by refusing to sell its products to any jobber, wholesaler, or retailer who sells to such organizations. This, on the ground that mail-order houses frequently sell at "cut prices," that is, at prices lower

than those designated by respondent (p. 38). Thus the boycott upon mail-order houses is immediately operative without evidence of price cutting.

No dealer, once cut off, is permitted again to become a distributor unless and until he gives "*promises and assurances*" that in the future he will maintain prices and refuse to sell to dealers who do not (p. 39).

Respondent also makes a practice of diverting so-called "turnover" orders received by its "specialty" salesmen from retail dealers (which orders are to be filled through jobbers designated by the retailer) by refusing to permit the salesmen to place such orders with the jobbers designated by the retail dealer, in case such jobbers have failed to observe its price-maintenance plan (whether by reason of their own delinquency as to resale prices, or by reason of their having persisted in supplying goods to delinquent retailers), and requires the retailer to designate price-maintaining jobbers (pp. 38, 39).

The record shows that respondent also continually seeks and secures the *cooperation of its distributors* in carrying out its merchandising plan as above described; that it requests such distributors to *report the names of competing distributors* who have failed to observe the resale prices, and, acting upon such information, cuts off the supplies of such competing dealers by refusing to sell to them directly and by notifying jobbers and wholesalers not to sell them (p. 41).

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As another means of maintaining and enforcing its resale prices upon the trade, respondent employs a *species of espionage*, by which it traces, through so-called "key numbers" stamped on the boxes, goods purchased from one distributor by another; and acting on this information, respondent *cuts off the supplies* of all distributors failing to cooperate in its price maintenance scheme (p. 39); for example, if a retail dealer has been reported to respondent as selling its product to consumers at prices lower than those designated by respondent, respondent ascertains, through its representatives, by means of these key numbers, the names of the jobbers from whom the retail dealer purchases his supplies. Respondent then notifies these jobbers to discontinue selling to such retailer, and in this way the latter is prevented from getting further supplies (pp. 38, 41).

Another adjunct to the plan is a *system of card records* kept by respondent, containing the names of wholesale and retail distributors *throughout the country*. On these cards all dealers who have failed to observe the retail prices are indicated as "Undesirable—Price Cutters," and on the cards bearing the names of dealers who sell to such undesirables are placed the words "Do not sell." It refuses to sell its goods to any dealers whose names appear on either of these lists, and distributors supplying such dealers are notified when the latter have been entered in these records in the above manner, and respondent's specialty salesmen are also notified. In this

way offending retailers are prevented from getting supplies of respondent's products from their own jobbers, and orders intended for the latter are required by respondent to be placed with other jobbers who maintain prices and sell only to price-maintaining dealers (pp. 39–40).

From time to time new distributors are added to respondent's "selected list," and others previously cut off are from time to time "reinstated" and allowed to purchase respondent's products, such additions and reinstatements being made as the result of *declarations, assurances* or *promises* exacted from such distributors, of such a character as to satisfy respondent that the new or reinstated distributors will, in future, resell the goods only at the designated prices, and will refuse to sell to others not observing such prices (pp. 39–40). If they violate either of these requirements, they go back on the "undesirable list," and so on.

It is stipulated in the record that the merchandising conduct of the respondent "does not constitute a contract or contracts whereby resale prices are fixed, maintained, and enforced." This must be interpreted in the light of the preceding agreed facts and obviously means that no contracts are entered into to observe prices. The Government contends that the agreed statement of facts discloses a "tacit understanding" among those who voluntarily or involuntarily are a part of the "merchandising system."

The effectiveness of the plan which has been in operation since several years prior to February 13, 1916 (p. 30), is demonstrated by the large proportion of distributors throughout the United States who are cooperating with respondent under this "tacit understanding" to make it a success (p. 30). The gross margin of profit allowed the dealers by the resale prices fixed by the respondent, excluding cash discount, ranges from 14.5 per cent to 20 per cent for the wholesale trade; and from 22 per cent to 40 per cent for the retail trade. The *net* margin of profit allowed by the resale prices fixed by the respondent range from 1 per cent to 15 per cent in the wholesale trade, and from 2 per cent to 25 per cent in the retail trade. The wide differences in net margins are due to differences in cost of doing business as between the grocery, drug, candy, and tobacco trades, and to the considerable differences in the costs of the individual dealers in a particular trade.

Upon the stipulation of facts the Commission found that the purpose and intent of the respondent in employing this merchandising policy is substantially as follows:

First. To provide all its so-called "selected" distributors, in case they adhere to the plan, with the *full profit*, arbitrarily fixed and established by the respondent, in accordance with its system of uniform resale prices;

Second. To provide all its distributors *protection* in securing such full profit; and

Third: To obtain the active support and cooperation of all its distributors, (*a*) in maintaining its said resale prices and pushing its price-maintained products; (*b*) in preventing and eliminating all sales at lower prices; and (*c*) in preventing any wholesale dealer or jobber, even though himself scrupulously observing the resale prices, from continuing to sell any retail dealer who has failed in any instance to observe the designated retail prices in selling to consumers (p. 37).

The effects of the system are found by the Commission to be (*a*) the elimination of all competition in prices among all distributors of Beech-Nut products, both at wholesale and at retail; (*b*) the consequent *enhancement of prices* required to be paid for such products by the consuming public; and (*c*) a tendency to compel manufacturers of competing products to adopt similar practices, in order to secure adequate distribution of their products by wholesale and retail dealers, and to overcome the preference of such dealers for respondent's products by reason of the added profits secured to them by the operation of the plan and the elimination of all dealer competition (p. 42).

The conclusion of law of the Commission was as follows:

> That the methods of competition set forth in the foregoing findings are, under the circumstances therein set forth, unfair methods of competition in interstate commerce, in violation of the provisions of an act of Congress

approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes" (p. 43).

III.

THE DECISION OF THE COURT BELOW.

A petition to review this order having been filed in the Circuit Court of Appeals for the Second Circuit, that court set aside the order (264 Fed. 885).

The reasons given by the court for this action clearly indicate that the court found the Commission's finding as to the facts to be supported by the evidence.

Of respondent's merchandising policy the Circuit Court of Appeals had this to say:

> The subject is one affecting the public generally, and plainly within the jurisdiction of the Commission. The ground upon which the conclusion of law rests is that the method is unfair, because it stifles competition and so restrains trade. The obvious purpose of the respondent is to prevent any competition as to the resale price between purchasers of its products. Such a method, founded upon an agreement between a manufacturer and purchasers severally, was held to be a violation of the Sherman Act, in *Dr. Miles Medical Co.* v. *Park & Sons Co., 220 U. S. 373.* It is difficult to say why a different conclusion should be reached, if the same result is obtained by acquiescence and cooperation without express agreement between the manufacturer

and his purchasers severally. *Eastern States Retail Lumber Association* v. *United States, 234 U. S. 600.* But we understand the Supreme Court to hold in *United States* v. *Colgate & Co., 250 U. S.* 300, that a similar but less drastic method of sale constitutes merely the exercise of a man's right to do what he will with his own, and is not obnoxious to the Sherman Act.

Manton, C. J., in the course of his concurring opinion, said:

> In my opinion, Congress had in mind in this legislation the prevention of acts which amount to unfair competition at their very inception. In this manner, the antitrust law was supplemented. To make successful either a criminal prosecution or other liability under the Sherman Act, it is necessary to find that a trust or monopoly is created which restrains trade. One act which may be an act of unfair competition may, of itself, restrain trade and may do damage to a complainant. The Federal Trade Commission Act was intended to reach such an unfair business method where the antitrust law could not do so. Of course, if all unfair acts were dealt with by the Federal Trade Commission, there would be no monoply or trust created. It was intended by section 5 of the act to prevent practices or methods of business unfair to the public which, if not prevented, would grow and create monopolies, and thus restrain trade and lessen competition. * * * The only difference between the price-fixing of the Dr.

> Miles case and the price-fixing in the "Beech-Nut Merchandising Policy," which the Federal Trade Commission in the case at bar has found offensive as an unfair method of competition, is that in the former case there was an agreement in writing provided for, while in the latter the success or failure of the plan depended upon a tacit understanding with the purchasers and prospective purchasers. It is difficult to see any difference between a written agreement and a tacit understanding. In each case, if the agreement, written or unwritten, is not lived up to, it means that the prospective purchaser could not buy or obtain the goods he wished. This may of itself create a restraint of trade. * * *
>
> In the plan of the petitioner herein called a "suggestion," which in truth is a tacit understanding to do precisely what was done in the Dr. Miles case, disobedience of the "suggestion" would result in a failure to be able to buy further from the petitioner. * * *

In spite of these conclusions, however, the court came to the following conclusion and reversed the order:

> The facts as found by the Commission, being supported by the testimony, are conclusive; but the effect of them is a question of law, to be expressed in a conclusion of law, and the Commission so describes it. We do not see how this conclusion can be sustained in face of the decision in the Colgate case.

IV.

ERRORS RELIED ON.

First. The court erred in holding that the Colgate case is conclusive against the Commission.

Second. The court overlooked the fact that a scheme for the suppression of competition may be within the provisions of section 5 of the Trade Commission Act as an unfair "method of competition" even if it does not constitute a contract or combination in restraint of trade in violation of the Sherman Act.

Third. The court erred in holding that the Beech-Nut Merchandising Policy does not constitute an "unfair method of competition" within the meaning of section 5 of the Trade Commission Act.

V.

ARGUMENT.

There are two distinct lines of argument upon either of which the Commission's order can be affirmed.

The first is that the facts stipulated by the respondent and found by the Commission clearly show that there was a tacit agreement or understanding between and among the respondent and the wholesalers, jobbers, and retailers handling its products, to eliminate all price competition in violation of the Sherman Antitrust Law, and therefore constituting an unfair method of competition.

The second point is that wholly without reference to the existence of an agreement or understanding amounting to a combination in restraint of trade

the system is condemned by section 5 of the Federal Trade Commission Act because it is an "unfair method" of competition.

The court below held that the Commission's findings, including the findings that the effect of the respondent's price maintenance system is "to eliminate competition in prices among jobbers, wholesalers and retailers, respectively, handling products manufactured by the respondent," were supported by the testimony and were therefore conclusive upon the court; that the subject matter of the proceeding was one affecting the public generally and therefore plainly within the jurisdiction of the Commission; and that the obvious purpose of the respondent was to prevent any price competition in the resale of products of the respondent's manufacture.

In spite of these holdings the court set aside the Commission's order solely upon the authority of *United States* v. *Colgate & Co.* (250 U. S. 300), stating that they did not see how the conclusion that the conduct of the respondent constituted an unfair method of competition within the Trade Commission Act could be sustained in the face of that decision.

This conclusion is the basic error of the Circuit Court of Appeals. Therefore, before taking up either of the two lines of argument stated above, consideration will be given to the bearing of the Colgate decision upon the questions involved in this proceeding, both from the standpoint of the application of the Sherman Law, and of the Trade Commission Act.

VI.

THE COLGATE CASE DISTINGUISHED.

The decision of the lower court was based on a clear misapprehension of the decision in the Colgate case. When the instant case was argued in the court below this court had not decided the later cases of *United States* v. *Schrader*, 252 U. S. 85, or *Frey* v. *Cudahy*, 41 Sup. Ct. Rep., 451. It is true that the Schrader case was decided seven days before the Circuit Court of Appeals handed down its decision in the instant case; but obviously the lower court did not know of the Schrader case, which qualified and explained the Colgate decision, as neither opinion makes any reference to the Schrader decision.

The Court of Appeals clearly indicated its view that, under the authority of the Dr. Miles Medical Co. case, the order of the Federal Commission was fully justified; but it quite erroneously reached the conclusion that the Colgate decision, while not expressly overruling the Dr. Miles Medical Co. case, yet was inconsistent therewith, and, as a later decision, was controlling.

That this was plain error is shown by this court in the Schrader case, when it said (on p. 99):

> The court below misapprehended the meaning and effect of the opinion and judgment in that case. (The Colgate case.) *We had no intention to overrule or modify the doctrine of Dr. Miles Medical Co.* v. *Park & Sons Co.*,

where the effort was to destroy the dealers' independent discretion through restrictive agreements. Under the interpretation adopted by the trial court and necessarily accepted by us, the indictment failed to charge that Colgate & Company made agreements, either express *or implied*, which undertook to obligate vendees to observe specified resale prices; and it was treated "as alleging only recognition of the manufacturer's undoubted right to specify resale prices and refuse to deal with anyone who failed to maintain the same."

It seems unnecessary to dwell upon the obvious difference between the situation presented when a manufacturer *merely* indicates his wishes concerning prices and declines further dealings with all who fail to observe them, and one where he enters into agreements—whether express *or implied from a course of dealing or other circumstances*—with all customers throughout the different States which undertake to bind them to observe fixed resale prices. In the first, the manufacturer but exercises his independent discretion concerning his customers and there is no contract *or combination* which imposes any limitation on the purchaser. In the second, the parties are combined through agreements designed to take away dealers' control of their own affairs and thereby destroy competition and restrain the free and natural flow of trade amongst the States.

The principles approved in *Dr. Miles Medical Co.* v. *Park & Sons Co.*, should have been applied.

Even if the later cases referred to did not manifest the clear purpose of this court to maintain its doctrine that all price-fixing systems, whether by express agreement or tacit understanding, were unlawful under the Sherman Antitrust Law, as clearly enunciated in the line of decisions commencing with the Dr. Miles Medical Co. case and finally reiterated and emphasized in the case of the *Boston Store* v. *The Gramophone Co.*, 246 U. S. 8 (where the late Chief Justice reviewed all the authorities and seemingly established the doctrine beyond further controversy), yet even a cursory examination of the Colgate case will show that it was clearly distinguishable from the instant case.

In the Colgate case, this court had under consideration a criminal indictment, charging Colgate & Company with unlawfully engaging in a combination with wholesale and retail dealers to procure adherence by such dealers to resale prices fixed by Colgate & Co.

Owing to the fact that the writ of error in the Colgate case was taken directly from the District Court to the United States Supreme Court, under the Criminal Appeals Act (30 Stat. 1246), the latter court was compelled to accept the District Court's interpretation of the indictment and confine its own review to the question of the construction of the statute involved in the lower court's decision.

This court said:

> Our problem is to ascertain, as accurately as may be, what interpretation the trial court placed upon the indictment—not to interpret

> it ourselves; and then to determine whether, *so construed*, it fairly charges violation of the Sherman Act. Counsel for the Government maintain, in effect, that, as so interpreted, the indictment adequately charges an unlawful combination (within the doctrine of *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373) resulting from restrictive agreements between defendant and sundry dealers whereby the latter obligated themselves not to resell except at agreed prices; and to support this position they specifically rely upon the above-quoted sentence in the opinion which begins "In the view taken by the court," etc. On the other hand, defendant maintains that looking at the whole opinion it plainly construes the indictment as alleging only recognition of the manufacturer's undoubted right to specify resale prices and refuse to deal with anyone who failed to maintain the same.
>
> Considering all said in the opinion (notwithstanding some serious doubts), we are unable to accept the construction placed upon it by the Government (p. 306). [Italics ours.]

It will thus be seen that there were two conflicting contentions as to the meaning of the opinion of the District Court, in which the language of the Colgate indictment was sought to be interpreted. The first of these, that put forward by counsel for the Government, was that the District Court had held that the indictment charged Colgate & Co. with entering into an unlawful combination by means of restrictive contracts, which obligated each and all of its distribu-

tors to resell only at prices designated by Colgate & Co.; the other contention, put forward by counsel for Colgate & Co., was that the District Court had construed the indictment "as alleging only recognition of the manufacturer's undoubted right to specify resale prices and refuse to deal with anyone who refused to maintain the same."

This court accepted the contention of defendant's counsel, and the judgment sustaining the demurrer to the indictment was thereupon affirmed, for the reason that the mere allegation that a manufacturer specified resale prices and refused to deal with anyone who failed to maintain the same, was plainly insufficient in itself to charge such manufacturer with creating and engaging in a *combination* to restrain trade in violation of the Sherman Law. In deciding in favor of the contention of the defendant, the court said:

> The position of the defendant is more nearly in accord with the whole opinion and must be accepted. And as counsel for the Government were careful to state on the argument that this conclusion would require affirmation of the judgment below, an extended discussion of the principles involved is unnecessary.

It thus appears that the counsel for the Government in the Colgate case *expressly conceded* that the judgment of the District Court should be affirmed unless the indictment, as interpreted below, charged Colgate & Co. with entering into *price-fixing contracts*. No claim was made on the part of the Government that in the absence of such contracts

a *combination* had been charged. The Colgate case thus presents an instance of an indictment drawn under the Sherman Law, intended and claimed by the Government to charge the defendant with entering into contracts with dealers for the maintenance of resale prices and the prevention of competition, thus constituting an unlawful combination, which indictment, at least as interpreted by the District Court, *entirely failed to charge the offense intended*, and which counsel for the Government admitted was not intended to and did not charge any other form of offense.

As a result of this situation, it follows that the question whether Colgate & Co. had entered into a combination or understanding, having in view the maintenance of resale prices, but not effected by means of a system of restrictive contracts such as existed in the Dr. Miles case (220 U. S. 373), was not before the court, and was not decided, or attempted to be decided, in the *Colgate* case.

In the instant case the court below therefore clearly erred when it adopted the view that the *Colgate* decision prevented it from holding that a combination existed in the present case, where they found that it had been conclusively proven that the same result had been attained as in the Miles case by means of *acquiescence and cooperation*, but without express agreement on the part of the dealers, or, as Manton, C. J., expressed it, where there was a "tacit understanding" to maintain prices and suppress competition.

It is of course well settled that an express agreement is never required to be shown in order to create a combination within the meaning of the Sherman Act. A tacit understanding is always sufficient. It is only essential that there be concerted action toward a uniform object, that is, *conscious cooperative action in aid of a joint undertaking.*

The decision of this court in the *Colgate* case did not attempt to overrule the long line of cases establishing this principle. The question was not before the Court as to whether Colgate & Co. had entered into an informal combination of this character with the various dealers handling its products.

There is no reason for thinking that if the question had been presented to this court in the Colgate case by a proper allegation of concerted action, cooperation and tacit understanding between the defendant and its distributors the court would have held the indictment, if thus interpreted, to have been bad.

There were few, if any, allegations in the Colgate indictment from which concerted action between Colgate & Co. and the various distributors of its products, to bring about the enforced maintenance of the specified resale prices throughout the trade, could have been inferred, or which would have justified the introduction of proof of such concerted action on the trial of the indictment, if the case had ever come to trial.

In this proceeding, on the contrary, cooperation between dealers, both wholesale and retail, and the

respondent, in carrying out the Beech-Nut plan, is not only charged in the complaint, but admitted in the agreed statement of facts, and found as a fact by the Commission (p. 37); and the finding has been held by the court below to be supported by the testimony and therefore conclusive.

This court did not hold in the Colgate case that the exacting from dealers of "*assurances and promises*" to adhere to the indicated prices was a mere exercise of the right to select one's own customers. Neither did the court so hold as to refusals by a manufacturer to sell to dealer A in order to induce dealers B, C, and D to maintain prices, i. e., not to compete; nor as to refusals to sell to dealers A, B, and C unless they ceased selling to dealer D, i. e., unless they joined in preventing him from competing; nor as to the practice of circulating blacklists among distributors and notifying jobbers to discontinue selling to blacklisted retailers, nor as to any other practices of like character to those shown in the record in this case.

Judge Manton, of the Circuit Court of Appeals, in his concurring opinion below, pointed out quite clearly the distinctions between the provisions of the Trade Commission Act and those of the Sherman Law. Among other things, he said:

> "The Federal Trade Commission Act was intended to reach such an unfair business method where the antitrust law could not do so."

Speaking of the necessity of establishing the existence of a *combination* in prosecutions under the Sherman Law, he said further:

> No such obligation is imposed upon the Federal Trade Commission before its order may issue requiring an individual, partnership or corporation engaged in commerce, to desist from a practice which might lead eventually to an unlawful trust or combination which would be in restraint of trade (p. 889).

Yet, quite inconsistently, it would seem, he came to the conclusion that if the antitrust law did not apply, therefore the "Beech-Nut Merchandising Policy" could not be reached under the Federal Trade Commission Act as an *unfair method of competition.*

In their brief in the United States District Court on the argument of the demurrer to the Sherman Law indictment against Colgate & Co., counsel for the defendant in that case, who were also counsel for this respondent in the court below, expressly called attention to the failure of the indictment to charge Colgate & Co. with certain practices, and these omissions were characterized by counsel as *highly significant,* the intimation being that if the indictment had in apt language charged Colgate & Co. with employing the practices referred to, there might have been grounds for holding the indictment sufficient. (See Colgate brief, p. 4.)

These practices with which Colgate & Co. were *not* charged were the following:

> (1) Refusing to sell to, or requesting assurances, or promises from, any dealer who, while reselling at the suggested prices, *sold to dealers who did not resell* at the suggested

prices; (2) requesting assurances or promises from any other than *immediate vendees* of Colgate & Co.; (3) refusing to sell unless the buyer sold only to customers selected by Colgate & Co.; (4) disclosing to any person the names on defendant's so-called "suspended lists" of dealers, or using such lists for any purpose except as a memorandum for defendant's own information and use in connection with its own dealings.

All of these practices are admitted by the respondent in the instant case to have been systematically indulged in by it in the distribution of its products. (Stipulation of facts, pars. 6bm, 6fm, 6i, etc., Rec. pp. 31–33.)

It is to be noted also that the following additional practices have been charged and proven against the respondent herein, which were not involved in the indictment against Colgate & Co.:

(1) Diversion by respondent of "turn-over" orders from one jobber to another, because of the former having sold at other than the suggested prices or having sold to other dealers who had failed to observe such prices (Stip. par. 6e, p. 32); (2) tracing and ascertaining by means of so-called "key numbers" the identity of distributors failing to observe the suggested prices, or selling to others so failing, and using the information thus obtained to cut off the supplies of such dealers by notifying jobbers and wholesale dealers not to sell to them (Stip. par. 6h, 6i, pp. 32–33); (3) system-

atic refusals to sell to mail-order houses or to distributors supplying such establishments par. 6c, p. 31).

Perhaps the most "drastic" of these practices is that of a virtual boycott, for failing to observe resale prices, of retail dealers with whom respondent has no direct dealings, but who purchase their supplies of Beech-Nut products from the jobbers. In this way, by the joint action of the competing retailers, the respondent and the jobbers, a general "embargo" is established against recalcitrant retail dealers, and, in some instances against jobbers, whose only offense is that they have disposed of their own goods at prices satisfactory to themselves.

In addition to this blacklisting and boycotting of dealers with whom respondent in many cases has no business relations whatever, we have also the practice indulged in by respondent, in aid of its price-maintenance scheme, of interfering in the relations between retailers and jobbers by diverting the retailers' orders from one jobber to another. (Stip. par. 8 (e), p. 38.)

Inasmuch as retail dealers frequently buy all their requirements from the same jobber, this unwarranted interference between jobber and retailer undoubtedly results in many cases in heavy losses to the jobber, and may be characterized as little short of oppression and as being in itself a palpably unfair trade practice. The jobber who is in this manner compelled to cut off his price-cutting customer's supplies

of Beech-Nut goods may as a result lose such customer's entire trade in other products as well.

Taking all these practices into account and bearing in mind that they are *systematically indulged in* by the respondent with the *avowed purpose* of preventing competition in its products and establishing its own uniform prices throughout the trade, it is clear that we have presented an entirely different state of facts from that which was before the court in the Colgate case.

It must be finally observed that in the Colgate case there were no restrictive contracts between the respondent and the trade to maintain prices. In this case there is clearly a "tacit understanding," upon the faith of which the respondent sells and the trade buys, and if any jobber or retailer violates this "tacit understanding" and is thereupon automatically blacklisted, he can not be restored to favor until he gives "promises and assurances" of adherence to the system in the future. Upon such "promises," the respondent sells and the delinquent dealer is again able to buy. This element clearly distinguishes this case from the Colgate case.

VII.

The Beech-Nut system of merchandising violates the Sherman Law.

Having thus distinguished the Colgate case, upon which the lower court based its rule, we pass to a discussion of the controlling decisions.

Since the decision of this court in the Miles Medical case (*Dr. Miles Medical Co.* v. *Park &*

Sons Co., 220 U. S. 373), it has been established law that a combination between a manufacturer and the jobbers and retailers handling his product to fix and maintain the prices at which the manufacturer's product may be sold at wholesale and at retail, in the hands of vendees and subvendees, is unlawful within the Sherman Antitrust Law. In that case separate contracts were entered into between the manufacturer and the jobbers and the manufacturer and the retailers, which, in terms, bound both jobbers and retailers not only to sell at the prices fixed by the manufacturer, but also not to sell the product to any dealer, whether jobber or retailer, who had not likewise contracted with the manufacturer to sell only at the specified prices.

The reasoning upon which the combination was held to violate the law was that its effect was to eliminate all price competition in the manufacturer's product after it left his hands, and thus to restrain trade. The manufacturer, it was said, could be in no better case with his system of contracts binding the dealers than would have been the dealers themselves if they had directly entered into agreements with each other to fix and maintain prices on the manufacturer's product in their hands. In the Miles case this court quoted, with approval, the following from the decision by Lurton, C. J., in *Park & Sons* v. *Hartman* (153 Fed. 24, 42), which case involved a similar system of contracts:

> The contracting wholesalers or jobbers covenant that they will sell to no one who does

> not come with complainant's license to buy, and that they will not sell below a minimum price dictated by complainant. Next, all competition between dealers is destroyed, for each such retailer can obtain his supply only by signing one of the uniform contracts prepared for retailers, whereby he covenants not to sell to anyone who proposes to sell again unless the buyer is authorized in writing by the complainant, and not to sell at less than a standard price named in the agreement. Thus all room for competition between retailers, who supply the public, is made impossible. If these contracts leave any room at any point of the line for the usual play of competition between the dealers in the products marketed by complainant, it is not discoverable. Thus a combination between the manufacturer, the wholesalers, and the retailers to maintain prices and stifle competition has been brought about.

In the closing paragraphs of the Miles opinion, this court says:

> And where commodities have passed into the channels of trade and are owned by dealers, the validity of agreements to prevent competition and to maintain prices is not to be determined by the circumstance whether they were produced by several manufacturers or by one, or whether they were previously owned by one or by many. The complainant having sold its product at prices satisfactory to itself, *the public is entitled to whatever advantage may be derived from competition in the subsequent traffic.*

The decision in the Miles Medical case has been repeatedly affirmed by this court, conspicuously in the decision in *Boston Store* v. *American Graphophone Co.* (246 U. S. 8), where this court held unlawful a similar, but apparently far less extensive, system of contracts, in that they fixed the prices at which approximately only 5,000 dealers, immediate vendees of the Graphaphone Company, should sell.

These decisions firmly established that a combination, effectuated by means of restrictive contracts, or otherwise, to maintain resale prices, violates the Sherman Law. Under the construction given that statute by this court over a long period it would appear also that any combination, for the same prohibited purpose, would be unlawful, and that the existence of such a combination may be proved by any facts or circumstances, competent and persuasive to that end, regardless of whether the existence of formal contracts were shown. Proof of the meeting of the minds of the manufacturer and dealers to accomplish the maintenance of the prices fixed by the manufacturer, together with proof of acts or conduct by the parties calculated and intended to accomplish the common design, appear to be sufficient.

The decision in the Colgate case, however, was erroneously interpreted as holding that an unlawful combination of the character involved in the case at bar could not be proven, other than by contracts between the manufacturer and dealers. The subsequent decisions of the court in the Schrader and

Frey cases (*U. S.* v. *Schrader's Sons, Inc.*, 252 U. S. 85; *Frey & Son* v. *Cudahy*, 41 Sup. Ct. Rep. 451) showed how erroneous this narrow interpretation was.

In the Schrader case this court, referring to the decision in the Colgate case, said:

> Under the interpretation adopted by the trial court and necessarily accepted by us, the indictment failed to charge that Colgate & Co. made agreements, either expressed or implied, which undertook to obligate vendees to observe specified resale prices; it was treated "as alleging only recognition of the manufacturer's undoubted right to specify resale prices and to refuse to deal with anyone who failed to maintain the same."
>
> It seems unnecessary to dwell upon the obvious difference between the situation presented when a manufacturer merely indicates his wishes concerning prices and declines further dealings with all who fail to observe them and one where he enters into agreements—*whether express or implied from a course of dealing or other circumstances*—with all customers throughout the different States which undertake to bind them to observe fixed resale prices. In the first, the manufacturer but exercises his independent discretion concerning his customers and there is no contract or combination which imposes any limitation on the purchaser. In the second, the parties are combined through agreements designed to take away dealers' control of their own affairs and thereby destroy competition and restrain the free and natural flow of trade amongst the States.

Again, in the Frey case, where no formal contracts were in evidence, but where a contract, combination, or conspiracy was sought to be proved by the various acts and by the conduct of the parties, this court said:

> It is unnecessary to repeat what we said in *U. S.* v. *Colgate & Co.* and *U. S.* v. *Schrader's Sons, Inc.* Apparently the former case was misapprehended. The latter opinion distinctly stated that the essential *agreement, combination or conspiracy might be implied from a course of dealing or other circumstances.* Having regard to the course of dealing and to the pertinent facts disclosed by the present record, we think whether there existed an unlawful combination or agreement between the manufacturer and jobbers was a question for the jury to decide, and that the Circuit Court of Appeals erred when it held otherwise (i. e., that under the decision in the Colgate case the existence of contracts must be proven).

The facts found by the Commission are ample to establish such an implied understanding between the respondent and the jobbers and retailers handling its products, to eliminate all competition in prices in such products after they leave the hands of the respondent. Indeed the facts are of such character and weight as not to permit of any other conclusion. See ante. pp. 3–10.

The court below has held that the findings of the Commission are supported by testimony and are therefore conclusive under the provisions of section 5 of the statute.

It is also expressly stipulated in the record and found by the Commission to be the fact, that respondent has indulged in all the various practices outlined above *in order to carry out the Beech-Nut policy or in the course of carrying it out.* (See pp. 31, 38.)

Is this conduct compatible with any theory other than that there is a complete understanding between the respondent and the jobbers and retailers that prices shall be maintained by all—that there is between the respondent and the dealers cooperation and concert of action to accomplish a common design, the complete elimination of all price competition in the respondent's products after they leave its hands? The question carries its own answer.

The fact is, that no price-maintenance scheme can be effectually carried out and enforced *without concerted action* on the part of the manufacturer and all distributors seeking to maintain prices. The action of the manufacturer alone can not accomplish the desired result; he must provide the distributors such "protection" as will insure to them the "full profit" afforded by the suggested price. He must have the "continued and enthusiastic cooperation" of the distributors. Resale prices do not maintain themselves, and, of course, no distributor will or can maintain them except on the condition that all are compelled to do so; and the simple and obvious fact is that all price-maintenance schemes, including the "Beech-Nut Merchandising Policy," under whatever form they may be disguised, constitute from their

very nature combinations to accomplish the purposes for which they are designed.

Looking through the *form* of respondent's merchandising plan to its *substance*, it is evident that the whole scheme is nothing but a subterfuge and substitute for the old Dr. Miles "contract" scheme of price-control, with the added feature of this standing threat to cut off the dealer's supplies not alone from the respondent direct, but from every "selected" dealer anywhere in the United States. Actual refusals to sell are of no particular value to respondent; they mean a real loss to it. It is the *power to threaten* that constitutes the chief value of the whole plan. It is the sword of Damocles over the head of every distributor, to whom it is a menace of serious pecuniary loss, including not only loss of profits on his Beech-Nut business, but possible loss of the entire trade of those customers who will not patronize a dealer who does not carry a "full line." The freedom of the dealer to sell Beech-Nut goods at any price he sees fit is therefore entirely imaginary. The longer he handles these products, the more imperative it becomes to him to have his sources of supply kept open and to maintain the manufacturer's prices to that end.

Viewed from the point of view of the public interest, it is plain that a merchandising plan, by whatever means carried out, which succeeds in suppressing all competition among distributors and fixes the price to be charged the public, is equally obnoxious, whether based on a system of void and unenforceable contracts or on concerted action to accomplish the same result,

backed by threats to refuse to sell, and by actual refusals in all cases where the designated prices are not observed. In either case competition ceases to operate and the consuming public pays enhanced prices for the commodities.

It is stipulated in the record that, in seeking the cooperation of its distributors, in carrying out its merchandising plan, respondent "deals with each customer separately" (p. 30), and great stress is laid by counsel for respondent on this fact as negativing any inference of concerted action between respondent and its price-maintaining distributors against those distributors who fail to observe its resale prices. But, of course, the whole record must be read to determine the true purpose and effect of respondent's course in this respect. Undoubtedly the circular letter of February 13, 1916 (p. 30, first p.), was sent to each customer separately; but it is to be noted that it was addressed to "jobbers" generally and is stipulated to have been sent "to all jobbers handling Beech-Nut products." The language of the letter is also such as to indicate to each distributor receiving it that it is intended *to apply to all alike.*

It is also expressly admitted in the agreed statement of facts (p. 31) that—

> In order to carry out said Beech-Nut policy and secure such cooperation, respondent—(*a*) Issues circulars, price lists, and letters *to the trade generally,* showing suggested uniform resale prices, both wholesale and retail, to be charged for Beech-Nut products.

And again:

> *Makes it known broadcast* to such selected jobbers, wholesalers, and retailers, whether sold "direct" or not, that if they, *or any of them*, fail to sell at the resale prices suggested by the respondent, as aforesaid, respondent will absolutely refuse to sell further supplies of its products to them, *or any of them*, and will also absolutely refuse to sell *any* jobbers, wholesalers, and retailers whatsoever who sell to other jobbers, wholesalers, and retailers, failing to resell at the prices suggested by the respondent (p. 31).

This language and in fact the language of the entire stipulation of facts clearly indicates that, even though petitioner deals separately with each customer in carrying out its plan, it does so in such a way as to bring home to each distributor the fact that all others are being treated in the same way and that the same requirements in regard to resale price maintenance apply to all alike.

In the same sense the complainant in the Dr. Miles Medical Co. case also dealt with each of its customers separately in procuring the agreements which were in that case declared invalid by the court; yet the court held that the whole plan, in spite of the fact that it consisted of separate agreements with each dealer, *in effect created a combination for the prohibited purposes.* (Miles case, p. 408.)

It is not, of course, incumbent on the Government to establish that every step taken or every practice employed by respondent to carry out its plan

is in and of itself unlawful. It is a well-settled principle repeatedly laid down by this court in Sherman Law cases that acts absolutely lawful in themselves may be steps in an unlawful plan. The plan may make the parts unlawful.

In the case of *Swift & Co.* v. *U. S.*, 196 U. S. 375, where the plan or scheme to suppress competition consisted of many parts or elements, this court said:

> *The scheme as a whole seems to us to be within the reach of the law.* The constituent elements, as we have stated them, are enough to give the scheme a body and, for all that we can see, to accomplish it. Moreover, whatever we may think of them separately when we take them up as distinct charges, they are alleged sufficiently as elements of the scheme. It is suggested that the several acts charged are lawful and that intent can make no difference. *But they are bound together as parts of a single plan. The plan may make the parts unlawful. Swift and Co.* v. *U. S., 196 U. S. 375, 396.*

In one of the earlier cases (*Montague* v. *Lowry*, 193 U. S., 38, 45) it is said:

> The whole agreement is to be construed as one piece, in which the manufacturers are parties as well as the San Francisco dealers, and *the refusal to sell* on the part of the manufacturers is connected with and *a part of the scheme* which includes the enhancement of the price of the unset tiles by the San Francisco dealers. The whole thing is so bound together that when looked at as a whole the sale of

> unset tiles ceases to be a mere transaction in the State of California, and becomes *part of a purpose* which, when carried out, amounts to and is a contract or combination in restraint of interstate trade or commerce.

In the instant case a nation-wide distribution of food products, dealt in in great quantities by wholesale and jobbing houses throughout the country, sold over the counters of many thousands of retail stores, and supposedly subject to that competition which it is the policy of the law to protect, was entirely removed from the operation of such competition. We find "the healthy rivalry of competing units" utterly paralyzed, and the consuming public compelled to pay prices arbitrarily fixed by the will of the manufacturer.

VIII.

The illegality of the methods used by the respondent is apparent even though no agreement or tacit understanding is found to exist.

We now submit an alternative argument which passes entirely out of the field of agreement or understanding. Let it be assumed that the stipulation of facts and the Commission's findings that the disclosed conduct of the respondent does not constitute a contract, be interpreted in the broadest sense, and that there is shown no agreement or understanding either actual or tacit, no meeting of the minds whatever. Let it be assumed that the parties to this merchandising plan are strangers in mind as in body. None the less the Commission's findings of fact and order are correct.

We will now discuss the pertinent provision of the Federal Trade Commission Act. We leave the explored geography of the Sherman Act and enter new and almost unexplored territory. The Sherman Act is a condemnation of definitely specified methods to restrain trade or to create monopoly.

The Federal Trade Commission Act provides that "unfair methods of competition in commerce are hereby declared unlawful." (Sec. 5, Fed. Trade Com. Act.)

This is a comprehensive condemnation of every method of bringing about unfair competition. All methods, any method, if it shall appear to be directed at the overthrow of free and fair competition, is condemned. The method, whatever it may be, involving or entirely free from the element of contract, agreement or understanding, is unlawful if its object be the prescribed unfair competition.

There is no need of a statutory declaration that unfair competition is unlawful. As Mr. Justice Brandeis noted in his opinion in the Gratz case (253 U. S. 421)—

> What section 5 declares unlawful is not unfair competition. That had been unlawful before. What that section made unlawful were "unfair *methods* of competition," that is, the method or means by which an unfair end might be accomplished.

Free and fair competition is the affirmative and positive principle upon which our industrial and, in turn, our social system is based. The competitive

system is justified upon the postulate contained within it that as a result of the operation of free and fair competition, there results to the unit the highest possible degree of reasonable return, in other words, social justice. The law clings to this proposition of free and fair competition because of a realization that a variation from the terms of the equation, free competition plus fair competition equals social justice, results in a loss of social justice. And so the law in its present state places monopoly at the opposite pole to free and fair competition. But seeing the necessity for prevention of monopoly as well as its punishment, attempt at monopoly was also included in the Sherman Act. Looking still further in the field of prevention, it appeared that the way from free and fair competition toward monopoly, led through restraint of trade, which was also taken up in the Sherman Act.

But experience proved that either because of the limited condemnation of methods by the Sherman Act or because it did not go far enough into the field to protect free and fair competition in the initial stages of departure from those principles, Congress took two steps forward by the Trade Commission Act. It threw off all limitations as to methods and amplified its definition of the unlawful departure from free and fair competition. Monopoly and restraint of trade are still under the legal ban but the scope of preventive measures has now been advanced in the anticipatory field to check the movement away from free and fair competition at the stage of unfair

competition. The causes impelling this advance are succinctly summarized in the dissenting opinion of Mr. Justice Brandeis in the Gratz case.

In the majority opinion in that case (Federal Trade Commission v. Gratz, 251 U. S. 351) this court has outlined the meaning of the phrase unfair methods of competition as follows:

> The words "unfair methods of competition" are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the Commission, ultimately to determine as matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression or *as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly.* The act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade.

If we set aside as not involved in this controversy, that part of this statement which refers to practices contrary to good morals and use only that which is applicable now, which clearly can be done because the public policy clause is separable from the good morals clause, and cancel the double negatives so as to restate the proposition in the affirmative, the rule laid down by this court may be thus stated. "The words 'unfair methods of competition' are applicable to practices heretofore regarded as against public policy because of their dangerous tendency unduly

to hinder competition or create monopoly. The act was intended to liberate (protect) free and fair competition as commonly (but not improperly) understood and practiced by honorable opponents."

The court has recognized the fact that the hindrance of competition is unlawful and has condemned the practices which are set in motion to accomplish the unlawful act, requiring the use of the same rule of reason, however, as was found to be implied in the Sherman Act, and demanding that the "tendency" be dangerous and the hindrance of competition be a restriction which impedes rather than a regulation which guides and subserves.

Section 5, then, taking up this court's definition, may be restated thus:

> All practices heretofore regarded as opposed to good public morals because characterized by deception, bad faith, fraud or oppression or as opposed to public policy because of their dangerous tendency unduly to hinder competition or create monopoly, are unlawful.

Or condensed for application to this case, the law is that

> All practices which have a dangerous tendency unduly to hinder competition are unlawful.

We submit that the facts in this case support the findings of the Commission and in particular, paragraph 16, which is as follows:

> That the effect of the said price maintenance system enforced as aforesaid has been and is:
>
> (1) To secure for the respondent, the Beech-Nut Packing Company, on the sales of the

products manufactured by it, the trade of jobbers, wholesalers, and retailers and including especially the relatively higher cost and more inefficient jobbers and the relatively higher cost and more inefficient retailers as heretofore set out and to enlist their active support and cooperation in enlarging the sale of the price-maintained products manufactured by respondent to the prejudice of competing manufacturers who do not fix, require, or enforce the maintenance of resale prices upon their products.

(2) To eliminate competition in prices among jobbers, wholesalers, and retailers, respectively, handling the products manufactured by the respondent, thus preventing jobbers, wholesalers, and retailers, respectively, and especially the lower cost and more efficient establishments from selling respondent's products at prices which they may deem adequate and which are warranted by their costs and selling efficiency as heretofore set out, whereby such portions of the public as require or prefer the products of the respondent are compelled to pay enhanced prices therefor.

(3) To tend to force manufacturers who do not fix, require, or enforce the maintenance of resale prices and who compete with respondent, also to inaugurate, maintain and enforce a system of resale prices upon their products in order to offset the preference of jobbers, wholesalers, and retailers, respectively, for the price-maintained products of respondent, thus enabling such manufacturers as do not now

> maintain such resale prices to compete upon more equal terms with the respondent, and thereby tending to compel the public generally to pay enhanced prices for the product of such competing manufacturers also.

From these findings, conclusive upon this court, if supported by testimony, but one conclusion of fact is possible, namely, that the methods of the respondent as a whole, have a dangerous tendency unduly to hinder competition. In fact they have more than the tendency, they have had the effect on a large scale, in a field nation wide, of destroying competition.

Clearly the court below was in error in holding itself precluded from affirming the Commission's order by the Colgate case. A decision that an indictment could not stand because it did not charge a combination under the Sherman Act has no applicability whatever to a case in which the presence or absence of an agreement or combination is irrelevant. The requirement of the Sherman law that there be a contract, combination, or conspiracy has no relation to the terse statement of the Trade Commission Act that all methods of accomplishing an unlawful object are themselves unlawful.

IX.

Refusal to sell is a qualified right.

The argument just presented recognizes no immunity or sanctity of any method which is directed to the accomplishment of an unlawful act. Certain of the methods used by the respondent may be urged as

pertaining to an individual's supposedly absolute right to do as he chooses with his own.

We have shown that contracts in restraint of trade are unfair methods of competition and that unfair methods of competition is an all inclusive phrase which ignores the presence or absence of a contract.

This case distinctly does not involve the economic merits or demerits of resale price maintenance. We have no argument to submit on either side of that question. The question here is whether resale price maintenance as a method of competitive effort, together with the details of the system which respondent used to effectuate its purpose, dangerously tended to an undue hindrance of competition. If it did, the use of that system is unlawful.

There is no more to be said for "refusal to sell" in this aspect than for any other method when it is used to accomplish an unlawful object. Here again the appearance or absence of an agreement or understanding is immaterial.

In passing upon the Colgate case this court said:

> In the absence of any purpose to create or maintain a monopoly, the act (Sherman Law) does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And of course he may announce in advance the circumstances under which he will refuse to sell.

Of course the second sentence is subject to the limitation with which the first sentence quoted com-

mences. The announced circumstances under which there will be a refusal to sell must be unaccompanied by the purpose to restrain trade.

This is once more the statement of the proposition that a method of competition, for that is what "refusal to sell" is, while in itself legitimate is not an unqualified right to be exercised in individual discretion. When applied to the accomplishment of an unlawful object, it is unlawful.

This is no new proposition. This court has said "It would be idle and trite to say that no right is absolute." (*Orient Ins. Co.* v. *Daggs*, 173 U. S. 557.) And again "No conduct has such an absolute privilege as to justify all possible schemes of which it may be a part." (*Aikens* v. *Wisconsin*, 195 U. S. 194, 206.) The latest declaration on this subject is contained in the opinion in *American Bank and Trust Company* v. *Federal Reserve Bank*, 41 Sup. Ct. Reporter 499. Mr. Justice Holmes speaking for the court says,

> The word "right" is one of the most deceptive of pitfalls: it is so easy to slip from a qualified meaning in the premise to an unqualified one in the conclusion. Most rights are qualified.

The right to refuse to enter into contracts is no more absolute or sacred than the right to contract. The right to refuse to sell and the right to sell are both natural rights, but they may both be limited in the public interest. Liberty of contract is protected by the fifth amendment to the Federal Constitution.

It may be qualified, however, by legislative enactment under the commerce clause, and has been so qualified by the Sherman Law, and later by the Trade Commission Act.

In the case of *Federal Trade Commission* v. *Gratz*, 253 U. S. 421, cited above, this court was of the opinion that the Federal Trade Commission statute was intended to prohibit practices which are against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. It is submitted that the effect of respondent's refusal-to-sell policy here in issue is not only to hinder but entirely to eliminate all competition among the many thousands of dealers handling respondent's goods. This being true, the practice can not be saved by the fact that one of the elements or constituent parts of the plan, i. e., one of the means by which it is carried out and forced upon the dealers, is this practice of constantly refusing to sell to all who will not do respondent's bidding and maintain its resale prices.

The judgment of the Circuit Court of Appeals setting aside the order of the Federal Trade Commission should be reversed.

JAMES M. BECK,
Solicitor General.
W. H. FULLER,
Chief Counsel, Federal Trade Commission.
MARSHALL B. CLARKE,
ADRIEN F. BUSICK,
Of Counsel.

OCTOBER 24, 1921.

○

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JAMES D. MAHER,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

FEDERAL TRADE COMMISSION,
Petitioner,

v.

BEECH-NUT PACKING COMPANY, a corporation,
Respondent.

No. [redacted]47

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR BEECH-NUT PACKING COMPANY, RESPONDENT.

CHARLES WESLEY DUNN,
Counsel for Respondent.

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I. The Sherman Act does not deprive a manufacturer or trader, engaged in an entirely private business and exercising his own independent discretion in the normal course of his own individual trade without any purpose to create or maintain a monopoly, of his fundamental right of freedom to trade, existing at common law, to-wit, the right freely to sell his own lawfully possessed property (consisting of legitimate articles of commerce) or not, as he pleases, for any reason he pleases, to whom he pleases, and to announce in advance the circumstances under which he will refuse to sell, who, when he does sell, imposes no restraint whatever upon the right of future alienation, by restrictive agreements (express or implied), since that act was enacted to preserve such fundamental right of freedom to trade, and not to impair or destroy it..... 26

II. Likewise, Section 5 of the Federal Trade Commission Act does not deprive a manufacturer or trader, engaged in an entirely private business and exercising his own independent discretion in the normal course of his own individual trade without any unlawful purpose (a purpose either opposed to good morals because characterized by fraud, deception, misrepresentation, bad faith, intimidation, oppression, or some other such wrongful element,

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or against public policy because involving undue restraint of trade or monopoly, actual or potential, or the doing of any act otherwise prohibited by law), of his fundamental right of freedom to trade, existing at common law, to-wit, the right freely to sell his own lawfully possessed property (legitimate articles of commerce) or not, as he pleases, for any reason he pleases, to whom he pleases, and to announce in advance the circumstances under which he will refuse to sell, who, when he does sell, imposes no restraint whatever upon the right of future alienation, by restrictive agreements (express or implied), since that act, as in the case of the companion Clayton Act, was enacted to supplement and strengthen the Sherman Act, and thus more completely and effectually to preserve and protect such fundamental right of freedom to trade, and not to impair or destroy it..... 60

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

FEDERAL TRADE COMMISSION, *Petitioner,* v. BEECH-NUT PACKING COMPANY, a corporation, *Respondent.*	No. 329.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR BEECH-NUT PACKING COMPANY, RESPONDENT.

Statement.

This is a writ of certiorari to review the judgment and decree of the United States Circuit Court of Appeals for the Second Circuit reversing and setting aside an Order to Cease and Desist issued by the Federal Trade Commission against the Beech-Nut Packing Company under Section 5 of the Act of September 26, 1914 (38 Stat., 717, c. 311), entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," commonly known as the *Federal*

Trade Commission Act. Section 5 is quoted in full in the margin, for convenient reference.[1]

The question presented is whether the Circuit Court of Appeals erred in holding that the Beech-Nut refusal-to-sell policy does not constitute an unfair method of competition within the meaning of Section 5. That Court set aside the Order of the Commission upon the ground that the conclusion of the Commisson that such policy does constitute an unfair method of competition outlawed by Section 5 cannot "be sustained, in face of the decision in the Colgate case" wherein it was held that a "similar" policy "constitutes merely the exercise of

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[1] Sec. 5. That unfair methods of competition in commerce are hereby declared unlawful.

The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.

Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the commission, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission. If upon such hearings the commission shall be of the opinion that the method of competition in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

If such person, partnership, or corporation fails or neglects to obey such order of the commission while the same is in effect, the

a man's right to do what he will with his own, and is not obnoxious to the Sherman Act". (Rec., p. 49.) (*Beech-Nut Packing Co.* v. *Federal Trade Commission*, 264 Fed. 885, 889.)

The Beech-Nut refusal-to-sell policy, as defined in the Complaint, Agreed Statement of Facts and Findings as to the Facts, is, in essence, this: The Beech-Nut Packing Company, engaged in an entirely private and strictly competitive manufacturing business and exercising its own independent discretion in the normal course of its own individual trade with its own customers, directly and separately, merely refuses to sell its own lawfully

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commission may apply to the circuit court of appeals of the United States, within any circuit where the method of competition in question was used or where such person, partnership, or corporation resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, partnership, or corporation and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission. The findings of the commission as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission, the court may order such additional evidence to be taken before the commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper.

The commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code.

Any party required by such order of the commission to cease and desist from using such method of competition may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission be set aside. A copy of such petition shall be forthwith served upon the commission, and thereupon the commission forthwith shall certify

possessed property (legitimate articles of commerce) to dealers who are not desired by it as customers for the reason that they either do not charge prices suggested by it or resell to other dealers who do not charge such prices. *Sales actually made, however, are unconditional and absolute. That is, when the Company does sell, it does not impose any restraint whatever upon the right of dealers freely to sell the Beech-Nut products bought and owned by them as they please, at any price they please, to whom they please, by contracts or agreements (whether express or implied). Each buyer receives, upon each sale, a clear, full and unqualified title and is entirely free to sell the property so bought and owned by him in the exercise of his own independent discretion.* All that dealers cannot do, so far as the Company is concerned, is to buy from it unless and until it chooses to

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and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript of the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission as in the case of an application by the commission for the enforcement of its order, and the findings of the commission as to the facts, if supported by testimony, shall in like manner be conclusive.

The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the commission shall be exclusive.

Such proceedings in the circuit court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the commission or judgment of the court to enforce the same shall in any wise relieve or absolve any person, partnership, or corporation from any liability under the antitrust acts.

Complaints, orders, and other processes of the commission under this section may be served by anyone duly authorized by the commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the principal office or place of business of such person, partnership, or corporation; or (c) by registering and mailing a copy thereof addressed to such person, partnership, or corporation at his or its principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post-office receipt for said complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same.

sell. There is no charge or finding in the record of any purpose by the Company to create or maintain a monopoly. There is no charge or finding in the record of any combination either between the Company and competing manufacturers, between competing dealers, or between the Company and its dealers. There is no charge or finding in the record of any purpose by the Company opposed to good morals because characterized by fraud, deception, misrepresentation, bad faith, intimidation, oppression or some other such wrongful element. *There is no charge or finding in the record that the Company effects any contracts or agreements, whether express or implied, with its dealers restricting their right freely to sell. On the contrary, the Commission officially admits in the Agreed Statement and officially finds as a fact in the Findings as to the Facts that "the merchandising conduct of respondent, heretofore defined and as herein involved, does not constitute a contract or contracts whereby resale prices are fixed, maintained, and enforced.* (Rec., pp. 35, 43.) The Agreed Statement neither alleges nor recites any facts from which it could be properly concluded that the suggested price are other than fair and reasonable in all respects. That is all there is of it.

The Beech-Nut Packing Company maintains that—

First: The acts of the Company described and set forth in the Complaint, as amended, Agreed Statement and Findings are not in themselves unfair and unlawful and do not constitute either an unfair method of competition within the meaning of Section 5 (or otherwise) or an offense under the Laws of the United States; the Findings as to the Facts are not supported by the Agreed Statement of Facts; the Conclusions of Law are not supported by either the Findings as to the Facts or the Agreed Statement of Facts; wherefore, no Order to

Cease and Desist ought to have been made and the Complaint ought to have been dismissed.

Second: The Complaint, when liberally construed, is plainly insufficient to show an unfair method of competition within the meaning of Section 5; the Order is wholly void because of want of authority and power to make it.

Third: The essential conduct in issue is the refusal-to-sell policy above defined; the decisive question in issue is whether such policy, so effected, constitutes an unfair method of competition within the meaning of Section 5.

Fourth: The Circuit Court of Appeals was right in holding that such policy does not constitute an unfair method of competition within the meaning of Section 5, upon the ground stated.

Fifth: Such refusal-to-sell policy involves but the lawful exercise of the fundamental right of freedom to trade, existing at common law, which right both the Sherman Act and the supplemental Trade Commission Act were enacted to preserve and safeguard and do not restrict or destroy, but the assertion by a manufacturer of his constitutional liberty.

Sixth: The *Colgate* (250 U. S. 300), *Schrader* (252 U. S. 85) and *Gratz* (253 U. S. 421) cases are decisive of the conclusion that Section 5 does not restrict the right of the Company so to refuse to sell.

Seventh: Section 5, if construed and applied to deprive the Company of its right so to refuse to sell and thus, in effect, to compel it, against its will, to sell its own private property to others, to whom it is under no contractual or other obligation to sell, for their private use and benefit, must be held to be repugnant to the Due

Process Clause of the Fifth Amendment to the Constitution of the United States and void.

The Beech-Nut Packing Company denies the charge by the Commission that such refusal-to-sell policy involves an undue restraint of trade, unlawful at common law and under the Sherman Act, with respect to products sold. No contracts or agreements, whether express or implied, are effected by the Company with its dealers whereby they are deprived of their right freely to sell the Beech-Nut products bought and owned by them. The Beech-Nut Packing Company denies the further charge by the Commission, made in its Brief, that such policy involves an unlawful combination within the prohibition of the Sherman Act. It is neither charged in the Complaint nor found in the Findings as to the Facts that such policy does involve an unlawful combination. And, in effecting such refusal-to-sell policy, the Company always acts entirely alone and independently and deals with each customer, separately, as the record indisputably establishes.

The record in this cause includes the Complaint (Rec., pp. 24-26), the Stipulation amending Paragraphs Two and Three of the Complaint (id., pp. 27-28), the Answer to the Complaint (id., pp. 26-27), the Agreed Statement of Facts (id., pp. 29-35), effected in lieu of testimony, the Report and Findings as to the Facts and Conclusions of Law (id., pp. 35-43), the Order to Cease and Desist (id., pp. 43-44), the original Petition for Review (id., pp. 1-23), the Opinion of the United States Circuit Court of Appeals for the Second Circuit (id., pp. 44-49), the Decree of that Court (id., pp. 52-53).

The Complaint and Order must be supported in fact by the Findings, and the Findings must be supported in fact by the Agreed Statement (Section 5). All infer-

ences and conclusions of fact contained in the Complaint, Findings and Order, which are not supported by the Agreed Statement, all allegations of the legal effect of the facts, all inferences and conclusions of law, and all matters of argument contained in the Complaint, Findings and Order, are entirely irrelevant. And all doubts as to the meaning of the language used in the Complaint, Agreed Statement, Findings and Order, or as to the sufficiency of the Complaint and Order, must be resolved in favor of the respondent.

On or about April 15th, 1918, the Federal Trade Commission issued a formal Complaint against the Beech-Nut Packing Company, charging a violation of Section 5 of the said Act of Congress approved September 26, 1914. (Id., pp. 24-26.) Paragraph Three thereof defined the charge in the following language:

> "That with the intent, purpose and effect of stifling and suppressing competition in the manufacture, marketing and sale of its products, in the course of such commerce, and as a means of securing the trade of dealers and obtaining their aid and cooperation in enlarging the sale of its products, and with the purpose of eliminating competition in the selling price among the various dealers in its products and thereby depriving the dealers of their freedom to sell such products at prices which, in their judgment, would be warranted by trade conditions and for other purposes, the respondent has fixed and maintained certain specified standard prices at which the products manufactured and sold by it shall be resold by the purchaser thereof, and requires its purchasers to agree to maintain or resell such products at such standard selling prices; and that for the purpose of maintaining said standard resale prices and of inducing and compelling its customers to maintain and keep such standard prices, the respond-

ent, for more than three months last past, has refused, and is still now refusing to sell its products to customers, or dealers who will not agree to maintain such specified standard resale prices, or who do not resell such products at the specified standard selling prices so fixed and determined by the respondent as aforesaid." (Id., p. 25.)

On June 11th, 1919, said Paragraph Three of the Complaint was amended to read thus:

"That the respondent, the Beech-Nut Packing Company, has adopted and enforced a system of fixing and maintaining certain specified standard prices at which its said chewing gum and food products shall be resold by purchasers thereof, including jobbers, wholesalers and retailers, with the purpose and effect of securing the trade of such jobbers, wholesalers and retailers and of enlisting their active support and cooperation in enlarging the sale of respondent's said products, to the prejudice of competitors of respondent who do not require and enforce the maintenance of resale prices on their products; and with the purpose and effect of eliminating competition in prices among all jobbers, wholesalers and retailers respectively engaged in handling the products manufactured by respondent, thereby depriving such distributors of their right to sell, and preventing them from selling, said products at such prices as they may deem to be, and as are, adequate and warranted by their respective selling costs and efficiency, and with various other effects; and that respondent, as a means of making effective its said system of resale prices as aforesaid, and of inducing and compelling its customers and the dealer customers of its customers to maintain such resale prices, has for more than two years last past: (a) Made it generally known to said jobbers, wholesalers and retailers, respectively, that it required and insisted that they should sell said products at the re-sale prices so fixed by respondent, and refuse to

sell the same to jobbers, wholesalers or retailers not maintaining such prices; (b) threatened to, and did, refuse to sell to all jobbers, wholesalers and retailers who failed to maintain the resale prices so fixed by respondent, or who sold to other distributors who failed to maintain such prices; (c) induced, or compelled said jobbers, wholesalers and retailers, by divers other means, not only to maintain its resale prices fixed as aforesaid, but also to discontinue selling said products to other jobbers, wholesalers and retailers, who did not maintain such resale prices; (d) caused the diversion of retailers' orders away from jobbers and wholesalers who did not maintain such resale prices so fixed by respondent, or who had resold its products to other jobbers, wholesalers, or retailers, who had failed to maintain such resale prices, and caused such orders to be given to other jobbers and wholesalers who had maintained such resale prices, and/or had refused to supply other jobbers, wholesalers and retailers failing to maintain such prices; (e) solicited and secured the cooperation of wholesalers, jobbers and retailers in reporting price cutters, all in pursuance of its efforts to ascertain the names of all distributors of its products who had failed to maintain the resale prices fixed by it, as aforesaid, and/or who had resold to other jobbers, wholesalers and retailers failing to maintain such prices; (f) entered in card records kept by it the names of all dealers reported to it, either in this, or other ways, as not maintaining said resale prices, or as selling to other distributors not maintaining such prices, and has taken various measures to prevent all such dealers from obtaining further shipments of its products from any source until it has received from them declarations, promises, assurances, statements, or other similar expressions, to the effect that in the future such dealers intend to, and will, sell such products at the resale prices fixed by respondent, and will refrain from selling the

same to other jobbers, wholesalers and retailers failing to maintain such prices; (g) employed various other means and methods for the enforcement of its said system of maintaining resale prices." (Id., pp. 27-28.)

We direct the attention of the Court to the important and significant fact that the charge made in Paragraph Three, as originally drawn, that the Company requires its purchasers *to agree* to maintain or resell at standard prices and refuses to sell to dealers who will not so agree, was subsequently withdrawn by the Commission, upon its own motion, because concededly the Company has not effected any such agreements. Paragraph Three, as amended and here in issue, contains no such charge. Hence, the Commission does not charge in this proceeding that the Company has made any restrictive agreements (whether express or implied) with its customers fixing resale prices. Indeed, on the contrary, it is expressly and explicitly declared in both the Agreed Statement (id., p. 35) and Findings (id., p. 43) that "*the merchandising conduct of respondent, heretofore defined and as herein involved, does not constitute a contract or contracts whereby resale prices are fixed, maintained, and enforced.*"

Thereupon the Company filed its Answer to the Complaint. (Id., pp. 26-27.) Paragraph Three thereof reads:

> "That it denies each and every allegation in Paragraph Three of said Complaint, excepting those hereinafter specifically admitted in this Answer. It denies that it has entered into any agreement with any purchaser of its products fixing any price at which such products shall be resold or requiring any purchaser to maintain any resale price or has in any way qualified the title of such purchaser to any such products or the freedom of such purchaser to resell such products at any price, by any restrictive agreement whatever.

> Respondent admits that, for more than three months last past, it has suggested selling prices to the immediate purchasers of its products, for use by such purchasers in the resale of said products, which prices were fair and reasonable, in all respects. Respondent further admits that, during said period, it has refused to continue to sell its products to dealers who did not resell such products at the fair and reasonable prices suggested by it." (Id.)

An Agreed Statement of Facts was effected in lieu of testimony and duly filed on June 11th, 1919. (Id., pp. 29-35.) On June 30th, 1919, the Commission made its Report in which it stated its Findings as to the Facts and Conclusions of Law. (Id., pp. 35-43.) We direct the attention of the Court to the fact that the Findings as to the Facts (id., pp. 36-43) embody a verbatim copy of the Agreed Statement of Facts (id., pp. 29-35), with these exceptions, to-wit: (a) the circular letter set out in Paragraph 5 of the Agreed Statement (id., pp. 30-31) is omitted from the similar Paragraph Five of the Findings (id., p. 37), an immaterial variation; (b) Paragraphs Six, Fourteen, Fifteen and Sixteen of the Findings (id., pp. 37-38, 42-43) *are entirely new, are not incorporated in or reproduced from the Agreed Statement.* The latter four paragraphs purport to define the alleged unlawful purpose and effect of the conduct in issue. It is manifest, however, that the so-called "findings as to the facts" contained in these paragraphs are not supported by the Agreed Statement, in their essential allegations, but, indeed, are directly contradicted by the remaining findings which are supported by the Agreed Statement. These paragraphs have been arbitrarily inserted into the Findings. They do not contain true findings as to the facts at all, in the proper meaning of that term. They are essentially composed of matters of argument and set

forth inferences and conclusions of fact and law which are without any support or justification whatever. They incorporate a specious argument built out of pure assumption and based upon a gross misinterpretation of Section 5 and a misapplication of settled principles of law. We again direct the attention of the Court to the fact that Section 5 specifically provides that the findings of the Commission as to the facts shall only be conclusive, in such a proceeding as this, if supported by testimony (here by the Agreed Statement). Hence, the alleged findings as to the facts contained in said paragraphs are not conclusive in this proceeding.

The essential[1] and indisputable facts[2] recited in the Agreed Statement and Findings are these:

> (a) *The Company is engaged in an entirely private and strictly competitive manufacturing business, producing divers food products (including, principally, sliced bacon, sliced beef, peanut butter, condiments and conserves, put up, for the most part, in original retail glass containers), candies, chewing gum, etc., and selling such products throughout the United States under the well-known "Beech-Nut Brand"* (id., pp. 29-30, 36-37); (b) *the Company sells to those dealers alone who are known or believed by it to be desirable and satisfactory customers in all respects* (id., pp. 30, 37); (c) *the Company always deals with each customer separately* (id.); (d) *the Company merely suggests resale prices for consideration by dealers, merely announces that it will refuse to sell to dealers who either do not charge the prices suggested by it or resell to other dealers who do not charge such prices, and merely refuses to*

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(1) This is clear upon the face of the Agreed Statement and Findings and established by the terms of the Order to Cease and Desist.

(2) It will be observed that much of the conduct so minutely and laboriously described in the Agreed Statement and Findings is wholly immaterial.

sell to practically[1] *all dealers who either do not charge the suggested prices or resell to other dealers who do not charge such prices* (id., pp. 31, etc., 38, etc.); (e) **when the Company does sell, however, it does not fix, maintain and enforce resale prices by restrictive contracts or agreements (express or implied)**[2] (id., pp. 35, 43); (f) *dealers, generally, "prefer" to deal with the Company and "prefer to handle and push Beech-Nut products because of the Company's said refusal-to-sell policy* (id., pp. 33, 40).

On June 30th, 1919, the Commission issued a formal Order to Cease and Desist reading as follows:

> "NOW, THEREFORE, IT IS ORDERED, that respondent, Beech-Nut Packing Company, its officers, directors, agents, servants and employees cease and desist from directly or indirectly recommending, requiring, or by any means bringing about the resale of Beech-Nut products by distributors, whether at wholesale or retail, according to any system of prices fixed or established by respondent, and more particularly by any or all of the following means:
>
> 1—Refusing to sell to any such distributors because of their failure to adhere to any such system of resale prices;

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(1) The Commission assumes, throughout its argument, that the Company refuses to sell to *all* dealers who either do not charge the suggested prices or resell to other dealers who do not charge such prices, whereas the contrary is the fact. The fact is that all the Company purposes to do, and all it does, is to refuse to sell to those dealers alone who charge prices for Beech-Nut products which are either unreasonably high or unfairly low, whereby a substantial injury is done to its own business, to the distributing trade and to the public at large.

(2) Paragraph 13 of the Agreed Statement of Facts (Rec., p. 35) and Paragraph Seventeen of the Findings as to the Facts (id., p. 43) declare:

> *"That the merchandising conduct of respondent, heretofore defined and as herein involved, does not constitute a contract or contracts whereby resale prices are fixed, maintained, and enforced."*

And, as hitherto pointed out, the Commission, upon its own motion, amended the Complaint originally issued against the Company to strike out the charge of resale-price-fixing agreements therein contained. The Complaint, in the form here in issue, makes no such charge.

2—Refusing to sell to any such distributors because of their having resold respondent's said products to other distributors who have failed to adhere to any such system of resale prices;

3—Securing or seeking to secure the co-operation of its distributors in maintaining or enforcing any such system of resale prices;

4—Carrying out or causing others to carry out a resale price maintenance policy by any other means." (Id., pp. 43-44.)

When the foregoing Order is stripped of all characterization and, construed in the light of the significant facts recited in the Agreed Statement and reproduced in the Findings, hereinbefore set forth, is reduced to its essentials, it is conclusively established that the *fundamental* conduct in issue, the *specific and particular* conduct which the Commission here seeks to prohibit and which this Order, if valid, will prohibit, is precisely this: *The refusal by the Beech-Nut Packing Company to sell to dealers who are not desired as customers by it for the reason that they either do not charge the prices suggested by it or resell to other dealers who do not charge such prices.* From the very beginning of this proceeding, and even before, the issue between the Company and the Commission has been simply this, whether such refusal-to-sell conduct involves the use of an unfair and unlawful method of competition within the meaning of Section 5. The terms of the Order plainly evidence that fact. Since the decision in the *Colgate* case, however, the Commission has sought to get as far away from that issue as possible. The so-called "cooperation" and "system of resale prices" refer to such refusal-to-sell conduct, and to nothing else. This is indisputable upon the very face of the Agreed Statement and Findings. There is neither charge nor finding anywhere in the Record that such conduct involves unlawful combination. On the con-

trary, the Agreed Statement and the Findings indisputably establish that the Company effects such conduct solely in pursuance of its own discretion independently exercised in the normal course of its own individual trade with its own customers, directly and separately. The language of the Order well illustrates the attempt by the Commission, in this proceeding, to outlaw the proper exercise of the fundamental right of freedom to trade which the Trade Commission Act was expressly enacted to preserve and protect, *by mere characterization.*

Thereupon the Beech-Nut Packing Company filed a written petition in the United States Circuit Court of Appeals for the Second Circuit praying that the Order of the Commission be set aside on the ground (Rec., pp. 22-23):

> "VIII. That said order to cease and desist is erroneous, unauthorized, and not sufficient in law and ought to be reviewed and set aside, inasmuch as it appears from the record in this cause that—
>
> 1. The acts of petitioner described and set forth in said complaint, as amended, are not in themselves unfair and unlawful and do not constitute an unfair method of competition or unfair methods of competition in interstate commerce, in violation of the provisions of section 5 of the act of Congress, approved September 26, 1914, entitled 'An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes'.
>
> 2. The acts of petitioner described and set forth in said stipulation of facts are not in themselves unfair and unlawful and do not constitute an unfair method of competition or unfair methods of competition in interstate commerce, in violation of the provisions of section 5 of the act of Congress approved September 26, 1914, entitled 'An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes'.

3. The acts of petitioner described and set forth in said report and findings as to the facts are not in themselves unfair and unlawful and do not constitute an unfair method of competition or unfair methods of competition in interstate commerce, in violation of the provisions of section 5 of the act of Congress approved September 26, 1914, entitled 'An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes'.

4. The acts of petitioner described and set forth in said complaint, as amended, and in said stipulation of facts and in said report and findings as to the facts do not constitute an offense under the laws of the United States.

5. The said findings as to the facts are not supported by the said stipulation of facts.

6. The said conclusions of law are not supported by the said findings as to the facts or by the said stipulation of facts."

The Circuit Court of Appeals reversed and set aside the Order of the Commission. (Rec., pp. 49, 52-53.) Judge Ward, speaking for the Court, said:

> "*We do not see how this conclusion* (i. e., the Commission's conclusion that the Company's conduct as defined in the Agreed Statement and Findings involves the use of unfair methods of competition in violation of Section 5) *can be sustained in the face of the decision in the Colgate case*". (Id., p. 49.) (Italics ours.)

We think that the Circuit Court of Appeals was right in its decision; that neither the Complaint nor Order here in issue can be sustained upon the application of the fundamental principle underlying the decision by this Court in the *Colgate* case.

In order to define the exact meaning and effect of the conduct here in issue, in fact and law, it is necessary to

note what the Complaint *fails* to charge, what the Agreed Statement and Findings fail to allege. And these omissions are highly significant.

The Complaint *does not* charge and the Agreed Statement and Findings (reproduced from and supported by the Agreed Statement) *do not* allege or recite any facts from which the conclusion could be properly drawn that the Beech-Nut Packing Company (a) effects or attempts to effect any contract, combination or conspiracy in restraint of interstate trade or commerce; (b) monopolizes or attempts to monopolize interstate trade or commerce in the articles produced by it, or effects its said refusal-to-sell conduct with any purpose of creating or maintaining a monopoly; (c) controls the raw materials, processes or machinery of production, or the means of transporting such materials or the finished products, or produces a dominating or even appreciable percentage of the total production of such articles; (d) acts in concert with any of the producers of similar articles, or has any relations with anyone other than with its own direct customers, separately, in effecting its said conduct, or that its customers act in concert in the resale of Beech-Nut products or have any relations with anyone other than with their own direct customers, separately, in the resale of such products; (e) is under any legal or moral obligation to produce or sell, or is under any special duty owed to the public as a public service, quasi-public service, or monopolistic corporation, or for any other reason whatever, or that there is any such legal or moral obligation resting upon its dealers to buy or sell its products or any products; (f) *effects any contracts or agreements (whether express or implied), or engages in any combination or conspiracy with its customers to fix, maintain and enforce resale prices. On the contrary, as hitherto shown, the Commission officially admits and declares, in both the*

Agreed Statement and Findngs, that the conduct here in issue does not involve any restrictive contracts or agreements whereby resale prices are fixed, maintained and enforced.

In short, no facts whatever are recited either in the Complaint, Agreed Statement or Findings, from which it could be properly inferred that the Company effects its said refusal-to-sell conduct in pursuance of an unlawful purpose, that is, a purpose either opposed to good morals because characterized by fraud, deception, misrepresentation, bad faith, intimidation, oppression, or some other such wrongful element, or against public policy, because involving undue restraint of trade or monopoly, actual or potential, or the doing of any act otherwise prohibited by law; with any intent to injure the business or do violence to the rights of its dealers, its competitors or any one else, or, in any way, to restrain the free and natural flow of trade in the channels of interstate commerce, or to do wrong, in any respect, to the general public. There are no facts therein recited from which the conclusion could be properly drawn that the Company imposes and enforces any restraint whatever upon the right or ability of dealers freely to buy whatever products they please, from whatever source they please, and freely to sell the products actually bought, paid for, and owned by them as they please, at any price they please, and to whom they please.

The resale prices suggested by the Company *are not* set forth in either the Agreed Statement or the Findings. The only direct and tangible reference to their identity and character, in the Agreed Statement, is a table showing the gross and net profit margins received by dealers in the event they elect to resell at the suggested prices, which margins are calculated upon the basis of said prices and *an estimate* of the cost of doing business of

such dealers. (Rec., p. 34.) This table is colorless. The bare figures of such margins are bluntly set out without any comment, annotation or evidential characterization. There is merely a brief supplemental statement explaining the causes of the divergencies in the indicated cost of doing business of the dealers. (Rec., p. 35.) There is no allegation anywhere in the Agreed Statement that either the suggested prices or the indicated margins are other than entirely fair and reasonable in all respects. And there are no facts recited in the Agreed Statement from which any such conclusion could be properly drawn. It cannot be held that the profit margins, so defined, are patently excessive, as they are not. What standard or rule of construction warrants any such conclusion? It cannot be assumed that such margins are in any respect excessive, since the presumption is, on the contrary, that they are fair and reasonable in all respects. The burden is upon the Commission duly to establish the contrary. This the Commission has utterly failed to do. The Commission has produced no proof whatever to support a conclusion that said margins or prices are other than entirely fair and reasonable. All that the Company has admitted and the Commission has established is that dealers receive the profit margins defined in said table if they elect to resell at the prices suggested by the Company. It is obvious that what is an unfair and unreasonable price in the merchandising of commodities is a very delicate and complex question of fact, the determination of which, in justice to all concerned, must be governed by positive proof or positive admission. To assert that the Company's prices are in any respect unfair and unreasonable constitutes a most serious and grave charge, a charge which may do irreparable injury to the good name of the Company. Such a charge should not and cannot be tolerated unless supported by conclusive evi-

dence or conclusive admission. Under the statute the fact of the unreasonable or unfair character of prices must be duly established as any other fact. When no testimony is taken and all the facts in issue are stipulated, as here, the findings as to the facts are strictly limited by the Agreed Statement and must be supported by the Agreed Statement beyond any reasonable doubt. All doubts arising from the construction of the Agreed Statement must be resolved in favor of the Company. And in illustration of the difficulty which is present in determining what is an unfair and an unreasonable price, we may note—and this is a matter of common knowledge —that a fair and reasonable profit margin is not a fixed and inflexible figure. There is a spread or range in such a margin until it reaches a maximum, on the one hand, beyond which it is unreasonably high, and a minimum, on the other hand, below which it is unfairly low. These limitations can only be determined by exact and positive proof, in the absence of admission.

Hence, it follows that, in the complete absence of any proof or admission to the contrary, it must be presumed that the margins and prices here in issue are fair and reasonable in all respects, although the right of the Company to refuse to sell its own lawfully possessed property, under the general circumstances here presented, is complete, is wholly independent of the character of such prices. There can be no doubt that the Company is clearly entitled to the full benefit of that presumption, upon this record.

And it is pertinent to observe that during the war the United States Food Administration enforced the Federal Food Control Act of August 10th, 1917, whereby the charging of excessive prices was declared to be unlawful. All of the products and transactions of the Beech-Nut Packing Company were subject to this statute and the

production and distribution of several of its products were made subject to special license thereunder. Neither maximum prices nor maximum gross margins of profit were officially defined with respect to the sale and resale of any of the products produced by the Company. The requirement was that they should be sold and resold only at a reasonable advance over the average cost or purchase price, as the case might be. *It is highly significant that the United States Food Administration did not once question or criticize the prices charged and suggested by the Company, although such prices were always subject to close official scrutiny.*

If the facts indisputably established by the record and the facts not negatived by the record, which are assumed to be true, are reduced to the form of a narrative, we find that the following is the essential conduct here charged to involve the use of an unfair and unlawful method of competition within the meaning of Section 5, to wit:

We have a single manufacturer of divers foods, candies and chewing gum, engaged in an entirely private business free from any suggestion of actual, potential or attempted monopoly in product, manufacture or market, not dominating the industry or market, under no legal or moral obligation either to produce or sell, always dependent upon the favor of buyers who are under no necessity, obligation or compulsion to buy from the Company and are able freely to purchase similar articles elsewhere, to the full extent desired, operating at all times and at its peril in an open and free market, in sharp competition with the producers of similar articles. Acting entirely in good faith and alone and exercising its own independent discretion in the normal course of

its own individual trade with its own customers, directly and separately, without any unlawful purpose, that is, a purpose either opposed to good morals because characterized by fraud, deception, misrepresentation, bad faith, intimidation, oppression, or some other such wrongful element, or against public policy because involving undue restraint of trade or monopoly, actual or potential, or the doing of any act otherwise prohibited by law, this single manufacturer effects the following merchandising policy and conduct, to wit:

> *It merely refuses to sell its own lawfully possessed property (unquestionably legitimate articles of commerce) to dealers who are not desired by it as customers for the reason that they either do not charge the prices suggested by it or resell to other dealers who do not charge such prices, albeit such prices are fair and reasonable in all respects, and are, in the honest judgment of the manufacturer, essential to the welfare and prosperity of its own business and in the best interest of the trade and public at large. Such refusals are made solely for the purpose of protecting its own individual and private business, the trade and the consuming public from the substantial injury which flows from the charging of unfair and unreasonable prices during the course of distribution. Sales actually made, however, are unconditional and absolute. That is, when the manufacturer does sell, it imposes no restraint whatever upon the right of alienation of buyers from it, no limitation upon price and purchasers upon future sales, by means of restrictive contracts or agreements (whether express or implied). Each buyer from this manufacturer receives, upon each sale, a full and unqualified title, possesses complete and unrestricted liberty of alienation with respect to the property so bought, paid for and owned by him, and is wholly free to resell such property as he pleases, to whom he pleases, and at any price he pleases. All that he cannot do, so*

far as the manufacturer is concerned, is to buy unless and until the manufacturer chooses to sell. Dealers who resell at the suggested prices do so solely because they themselves, in the free and independent exercise of their own individual discretion, prefer to do so and not because they are obligated or compelled to do so by reason of any restraint actually imposed by the Company upon their right of freedom to sell.

We say with confidence that, if such refusal-to-sell conduct does not involve the use of an unfair and unlawful method of competition within the meaning of Section 5, then there is no conduct defined either in the Complaint, the Agreed Statement or the Findings, which does. It is idle for the Commission to speak of the "suppression of competition", "an illegal scheme", or to use other such general characterizations, unless such refusal-to-sell conduct is outlawed by Section 5. What we have succinctly set forth above is the unfair and unlawful method of competition, if any.

We submit that such refusal-to-sell conduct does not involve the use of an unfair method of competition in violation of Section 5, that such conduct amounts to no more than the lawful exercise by the manufacturer of its fundamental right of freedom to trade, which right the Federal Trade Commission Act was expressly enacted more effectually to preserve and safeguard and does not restrict or destroy. The proposition essentially involved in the Order issued by the Federal Trade Commission against the Beech-Nut Packing Company is a most serious perversion of Section 5. So far from being a proper construction of that section, such a construction, we further submit, must be held to render it repugnant to the Fifth Amendment to the Constitution of the United States and void. This is not a case of a public calling or of a business affected with a public interest, and the

ordinary principle of liberty, conserving the right of every man freely to deal or refuse to deal with his fellow men, that is, the free and untramelled right to contract or not to contract, applies. We believe that the proposition advanced by the Commission is subversive of the great remedial purpose contemplated by the Federal Trade Commission Act, is unwarranted by judicial decisions and is opposed to sound reasoning, that its adoption would be a serious menace to the business interests of the country and that, instead of safeguarding the public, it would convert the statute by a process of construction into a vehicle of grave injury. A violation of Section 5 of the Federal Trade Commission Act is not to be built out of the mere lawful exercise of undoubted rights.

ARGUMENT.

I.

THE SHERMAN ACT DOES NOT DEPRIVE A MANUFACTURER OR TRADER, ENGAGED IN AN ENTIRELY PRIVATE BUSINESS AND EXERCISING HIS OWN INDEPENDENT DISCRETION IN THE NORMAL COURSE OF HIS OWN INDIVIDUAL TRADE WITHOUT ANY PURPOSE TO CREATE OR MAINTAIN A MONOPOLY, OF HIS FUNDAMENTAL RIGHT OF FREEDOM TO TRADE, EXISTING AT COMMON LAW, TO-WIT, THE RIGHT FREELY TO SELL HIS OWN LAWFULLY POSSESSED PROPERTY (CONSISTING OF LEGITIMATE ARTICLES OF COMMERCE) OR NOT, AS HE PLEASES, FOR ANY REASON HE PLEASES, TO WHOM HE PLEASES, AND TO ANNOUNCE IN ADVANCE THE CIRCUMSTANCES UNDER WHICH HE WILL REFUSE TO SELL, WHO, WHEN HE DOES SELL, IMPOSES NO RESTRAINT WHATEVER UPON THE RIGHT OF FUTURE ALIENATION, BY RESTRICTIVE AGREEMENTS (EXPRESS OR IMPLIED), SINCE THAT ACT WAS ENACTED TO PRESERVE SUCH FUNDAMENTAL RIGHT OF FREEDOM TO TRADE, AND NOT TO IMPAIR OR DESTROY IT.

1. *This principle is now indisputable, as a result of the prior decisions of this Court.* (*United States* v. *Colgate & Co.*, 250 U. S. 300, and cases cited; *United States* v. *A. Schrader's Son, Inc.*, 252 U. S. 85; *Federal Trade Commission* v. *Gratz et al.*, 253 U. S. 421.) In the leading case of *United States* v. *Colgate & Co.* (*supra*), this Court, speaking through Mr. Justice McReynolds, said:

> "The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce—*in a word, to preserve the right of freedom to trade. In the absence of any purpose to create or maintain a*

monopoly, the Act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell. 'The trader or manufacturer, on the other hand, carries on an entirely private business and can sell to whom he pleases.' *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 320. 'A retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself, and he may do so because he thinks such dealer is acting unfairly in trying to undermine his trade.' *Eastern States Retail Lumber Dealers Association* vs. *United States*, 234 U. S. 600, 614." (*Id.* p. 307.) (Italics ours.)

The Court also referred to its opinion in the *Standard Oil Company* and *American Tobacco Company* cases, respectively, wherein it defined the fundamental right of freedom to trade existing under the common law and announced that the purpose of the Sherman Act was to preserve that right, to wit:

"From the review just made it clearly results that outside of the restrictions resulting from the want of power in an individual to voluntarily and unreasonably restrain his right to carry on his trade or business and outside of the want of right to restrain the free course of trade by contracts or acts which implied a wrongful purpose, *freedom to contract and to abstain from contracting and to exercise every reasonable right incident thereto became the rule in the English law.*" (*Standard Oil Company v. United States*, 221 U. S., 1, 56.) (Italics ours.)

"Indeed, the necessity for not departing in this case from the standard of the rule of reason which is universal in its application is so plainly required

> in order to give effect to the remedial purposes which the act (i. e., the Sherman Act) under consideration contemplates, and to prevent that act from destroying all liberty of contract and all substantial right to trade, and thus causing the act to be at war with itself by annihilating the *fundamental right of freedom to trade which, on the very face of the act, it was enacted to preserve,* is illustrated by the record before us." (*United States v. American Tobacco Company,* 221 U. S., 106, 180.) (Italics ours.)

The complete statement by Mr. Justice Peckham, in the course of the opinion of the Court in the *Trans-Missouri* case (supra), quoted in part in the *Colgate* case, wherein he distinguished the rights incident to a business affected with a public interest from the rights incident to a business entirely private in character, was this:

> "The trader or manufacturer, on the other hand, carries on an entirely private business, *and can sell to whom he pleases;* he may charge different prices for the same article to different individuals; he may charge as much as he can get for the article in which he deals, whether the price be reasonable or unreasonable; he may make such discrimination in his business as he chooses, *and he may cease to do any business whenever his choice lies in that direction.*" (Id., p. 320.) (Italics ours.)

This, of course, was said long before the enactment of Section 2 of the Clayton Act whereby price discrimination between purchasers under the conditions defined is prohibited. The statement, however, is of particular interest because it serves to illustrate the general conception of the liberty of the individual manufacturer and trader, engaged in a private business, which survived the Sherman Act in the view of the Court, at the time of its most drastic application.

In *United States* v. *A. Schrader's Son, Inc.* (*supra*), the doctrine announced in the *Colgate* case was reviewed (pp. 98-100) and reaffirmed.

And in the recent case of *Federal Trade Commission* v. *Gratz et al.* (*supra*), arising under the Federal Trade Commission Act and precisely in point, this Court, again speaking through Mr. Justice McReynolds, said:

> "All question of monopoly or combination being out of the way, a private merchant, acting with entire good faith, may properly refuse to sell except in conjunction, such closely associated articles as ties and bagging. *If real competition is to continue, the right of the individual to exercise reasonable discretion in respect of his own business methods must be preserved. United States* v. *Colgate & Co.*, 250 U. S. 300; *United States* v. *A. Schrader's Son, Inc.*, 252 U. S. 85." (Id., pp. 428-429.) (Italics ours.)

We also quote the pertinent observation by Mr. Justice Brewer in the *Northern Securities Company* case, to-wit:

> "Further, the general language of the act, (i. e., the Sherman Act) is also limited by the power which each individual has to manage his own property and determine the place and manner of its investment. *Freedom of action in these respects is among the inalienable rights of every citizen.*" (*Northern Securities Company* v. *United States*, 193 U. S. 197, 361.) (Italics ours.)

In *Dueber Watch-Case Manufacturing Company* v. *E. Howard Watch & Clock Company et al.* (66 Fed., 637), decided in 1895, one of the earliest cases arising under the Sherman Act, the United States Circuit Court of Appeals for the Second Circuit said:

> *"An individual manufacturer or trader may surely buy from or sell to whom he pleases, and*

may equally refuse to buy from or sell to anyone with whom he thinks it will promote his business interests to refuse to trade." (*Id.*, p. 645.) (Italics ours.)

The principle so recognized in the *Dueber* case was later affirmed and applied by that Court in *Great Atlantic & Pacific Tea Company* v. *Cream of Wheat Company* (227 Fed. 46), decided in 1915 or over three years prior to the decision of this Court in the *Colgate* case, wherein the precise question later settled by the *Colgate* case was presented for determination in a proceeding asserted to be authorized by the Clayton Act. The Court squarely affirmed the right of an individual manufacturer, engaged in a private business free from monopoly, to sell or not, as he pleases, to who he pleases, and unanimously held that the exercise of this right "is no offense against common law, statutes, public policy, or good morals." (Id., p. 47.) Judge Lacombe, delivering the opinion of the Court, said:

> "*We had supposed that it was elementary law that a trader could buy from whom he pleased and sell to whom it pleased, and that his selection of seller and buyer was wholly his own concern.* 'It is a part of a man's civil rights that he be at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice.' Cooley on Torts, p. 278. See, also, our own opinion in *Greater New York Film Co.* v. *Biograph Co.*, 203 Fed., 39, 121 C. C. A., 375.
>
> "*Before the Sherman Act it was the law that a trader might reject the offer of a proposing buyer, for any reason that appealed to him; it might be because he did not like the other's business methods, or because he had some personal difference with him, political, racial, or social. That was purely his own affair, with which nobody*

else had any concern. Neither the Sherman Act, nor any decision of the Supreme Court construing the same, nor the Clayton Act, has changed the law in this particular. We have not yet reached the stage where the selection of a trader's customers is made for him by the Government." (*Id.*, pp. 48, 49.) (Italics ours.)

The case of *Greater New York Film Rental Company* v. *Biograph Company et al.* (203 Fed., 39), referred to in the opinion in the *Tea Company* case (*supra*), involved an appeal from an order by the District Court granting the Film Rental Company a preliminary injunction against the Biograph Company whereby the latter was commanded to deliver films of its own manufacture to the former as it might from time to time order. The Court, finding that there was no contract between the two companies under the terms of which the Biograph Company had agreed to continued to supply the Film Rental Company with films of its own manufacture for any period of time, reversed the order of the District Court on the ground that the Film Rental Company "could not obtain specific relief of the sort accorded by this preliminary injunction, viz., a decree compelling the Biograph Company to sell films to complainant against that company's wish." (Id., p. 40.)

The following statement by the United States Circuit Court of Appeals for the Eighth Circuit may also be referred to:

> "There was no law which required the coal company to sell its coal to Sharp on the terms which he prescribed, or to sell it to him at all. It had *the undoubted right to refuse to sell* its coal at any price. It had the right to fix the prices and the terms on which it would sell it, *to select its customers*, to sell to some and to refuse to sell to others, to sell to some at one price and on one set

> of terms, and to sell to others at another price and on a different set of terms. There is nothing in the Act of July 2, 1890, which deprived the coal company of any of *these common rights of the owners and venders of merchandise,* and if it did not combine with some other person or persons so to do its refusal to sell its coal to Sharp unless he would withdraw his advertisement of a reduction in his retail price of it was not the violation of the Sherman anti-trust act charged in the indictment." (*Union Pacific Coal Company* v. *United States,* C. C. A., Eighth Circuit, 173 Fed. 737, 739.) (Italics ours.)

This case was decided prior to the enactment of the Clayton Act. Accordingly, the statement of the Court must be considered to be qualified by Section 2 of that act, insofar as it refers to discrimination in price between purchasers.

Although we are able to quote at length from decisions of the several appellate courts in further illustration of the continued and uniform recognition of the general principle which we have stated, it is unnecessary to do so. Suffice it now to say that whenever the right of a manufacturer to sell or not, as he pleases, to whom he pleases, exercised under the general circumstances defined, has been challenged or considered, our highest courts, both Federal and State, have always fully upheld it, without exception and without dissent.

This fundamental right of freedom to trade is analogous to the fundamental right of the individual to sell his labor or not, as he pleases, and to whom he pleases. The principle was clearly stated by Mr. Justice Harlan in the *Adair* case:

> "While, as already suggested, the rights of liberty and property guaranteed by the constitution against deprivation without due process of law, is subject to such reasonable restraints as the com-

mon good or the general welfare may require, *it is not within the functions of government—at least in the absence of contract between the parties—to compel any person in the course of his business and against his will to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another.* The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions under which he will accept such labor from the person offering to sell it. So the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee. * * * *In the absence, however, of a valid contract between the parties controlling their conduct towards each other and fixing a period of service, it cannot be, we repeat, that an employer is under any legal obligation, against his will, to retain an employee in his personal service any more than an employee can be compelled, against his will, to remain in the personal service of another.*" (*Adair* v. *United States*, 208 U. S., 161, 174-176.) (Italics ours.)

2. *The fundamental right of a manufacturer so freely to sell or not, as he pleases, for any reason he pleases, to whom he pleases, and to announce in advance the circumstances under which he will refuse to sell, necessarily includes the specific right to refuse to sell to dealers for the particular reason that they either do not charge the resale prices suggested by him or resell to other dealers who do not charge such prices, which prices are, in the honest judgment of the manufacturer, entirely reasonable and essential to efficient and fair trade, since such right of refusal, exercised under the general circumstances defined, is complete, embraces the specific exercise thereof, and is independent of the reason of its exercise.* (Same cases.)

Such a manufacturer may so refuse to sell(a) "whenever his choice lies in that direction" (*United States* v. *Trans-Missouri Freight Association, supra,* p. 320); (b) "for reasons sufficient to himself" (*Eastern States Retail Lumber Dealers' Association* v. *United States, supra,* p. 614); (c) "because he thinks such dealer is acting unfairly in trying to undermine his trade" (id.); (d) because "he thinks it will promote his business interests to refuse to trade" (*Dueber Watch-Case Manufacturing Company* v. *E. Howard Watch & Clock Company et al., supra,* p. 645); (e) "for any reason that appealed to him; it might be because he did not like the other's business methods, or because he had some personal difference with him, political, racial, or social. That was purely his own affair, with which nobody else had any concern" (*Great Atlantic & Pacific Tea Company* v. *Cream of Wheat Company, supra,* p. 49); (f) "* * * 'whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice.' Cooley on Torts, p. 278" (id.); (g) *because a dealer fails to charge the resale prices suggested by him* (*United States* v. *Colgate & Company* and *Great Atlantic & Pacific Tea Company* v. *Cream of Wheat Company, supra*). In the *Colgate* case this Court held that "the manufacturer's undoubted right to specify resale prices and refuse to deal with anyone who failed to maintain the same" is embraced within "the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal" and to "announce in advance the circumstances under which he will refuse to sell", which right is not restricted by the Sherman Act, in the absence of any purpose to create or maintain a monopoly. (*Id.,* pp. 306, 307.)

Principle, reason and authority unite in support of the proposition that once it is established, as it is, that

a private manufacturer has the clear right so freely to refuse to sell and to announce in advance the circumstances under which he will refuse to sell, the conclusion must follow that he may exercise that right in a specific instance for any reason satisfactory to him or for no reason at all. This right is not qualified by the reason of the refusal (since the right of refusal is independent of the reason of its exercise), by the announcement of an intended refusal for a specific reason (since the manufacturer thereby announces that he will do what he has the right to do), by the frequency of its exercise (since the right of refusal is not measured by the number of times it is asserted), or by the identity of the person to whom the refusal is made (since the right of refusal is in no way subject to the control of the proposed buyer, whoever he may be). The manufacturer who declines to sell for a reason, disclosed or undisclosed, is in precisely the same legal position as the manufacturer who declines to sell for no reason at all. To say that the reason of the refusal impairs the right of refusal is to deny the existence of such right, is to deny the very right of freedom to trade which is the law of the land. Hence, it in no way derogates from the entire legality of the refusal to define the reason of its exercise, as here, an entirely lawful reason. For, as a matter of fact, the refusals here in issue are effected, in each instance, for the reason that the manufacturer is of the opinion that dealers who fail to charge reasonable prices or sell to other dealers who fail to charge reasonable prices—the prices suggested by the manufacturer are considered by him to be entirely fair and reasonable—are "acting unfairly in trying to undermine his trade," which, as this Court has said in the *Retail Lumber Dealers' Association* case (*supra*), is an entirely proper and lawful reason for a refusal.

It is futile, of course, to attempt to distinguish this case from the *Colgate* case on the ground that one of the two reasons for the refusal here involved was not in issue in that case. The controlling principle is universal in its application. He would be bold, indeed, who would venture to assert that while the manufacturer has the lawful right to refuse to sell to a dealer for the reason that such dealer fails to charge the resale prices suggested by him, as this Court has unanimously decided, he has not the lawful right to refuse to sell to the same dealer for the reason that he resells to another dealer who does not charge such prices. The essential conduct in each instance is the refusal of the manufacturer to sell his own property. Such refusal involves no more than the lawful exercise of the fundamental right of freedom to trade. And no restraint is placed upon the right and freedom of future alienation, once sales have been made.

3. *Hence, a manufacturer, engaged in an entirely private business and exercising his own independent discretion in good faith in the normal course of his own individual trade without any purpose to create or maintain a monopoly, who refuses to sell to dealers for the reason that they either do not charge the resale prices suggested by him or resell to other dealers who do not charge such prices, which prices are, in his honest judgment, entirely reasonable and essential to efficient and fair trade, and who, when he does sell, imposes and enforces no restraint whatever upon the right and freedom of future alienation, by restrictive agreements (express or implied), does not thereby commit an offense against the Sherman Act, since he is merely lawfully exercising the fundamental right of freedom to trade, which, as stated, the Sherman Act was enacted to preserve, and not to impair or destroy.* (*United States* v. *Colgate &*

Company, supra; United States v. *A. Schrader's Son, Inc., supra; Great Atlantic & Pacific Tea Company* v. *Cream of Wheat Company, supra; Cudahy Packing Company* v. *Frey & Son*, 261 Fed. 65.)

The *Colgate* case came to this Court upon a writ of error sued out by the United States under the Criminal Appeals Act of March 2, 1907 (34 Stat. 1246, c. 2564), to review the judgment of the United States District Court for the Eastern District of Virginia sustaining a demurrer to an indictment against Colgate & Company, the well-known manufacturer of soaps and toilet articles, for an alleged violation of the Sherman Act. Mr. Justice McReynolds delivered the unanimous opinion of the Court affirming the judgment of the District Court.

The indictment charged Colgate & Company with knowingly and unlawfully creating and engaging in a combination with its dealers to suppress competition amongst them in restraint of interstate trade and commerce by inducing and procuring the adherence of such dealers, in reselling the Colgate products, to resale prices fixed by the Company and preventing such dealers from reselling at lower prices; that with this purpose and effect the Company did the things and induced many dealers to do the things described in the indictment by reason of which such dealers, with few exceptions, resold the Colgate products at the uniform prices fixed by it and refused to sell at lower prices which resulted in the maintaining and enhancing of the resale prices of such products to the retail dealers and consuming public throughout the United States. The acts from which the Government sought to spell out this charge were summarized by the Court thus: "Distribution among dealers of letters, telegrams, circulars and lists showing uniform prices to be charged; urging them to adhere to such prices and notices, stating that no sales would be made

to those who did not; requests, often complied with, for information concerning dealers who had departed from specified prices; investigation and discovery of those not adhering thereto and placing their names upon 'suspended lists'; requests to offending dealers for assurances and promises of future adherence to prices, which were often given; uniform refusals to sell to any who failed to give the same; sales to those who did; similar assurances and promises required of, and given by, other dealers followed by sales to them; unrestricted sales to dealers with established accounts who had observed specified prices, etc." (*Id.*, p. 303.)

The Court first stated that the problem presented by this case was two-fold, *first*, to ascertain the interpretation of the indictment by the District Court, which interpretation must be accepted, and *second*, to determine whether the indictment, as so interpreted, charges a violation of the Sherman Act. "Our problem is to ascertain, as accurately as may be, what interpretation the trial court placed upon the indictment—not to interpret it ourselves; and then to determine whether, so construed, it fairly charges violation of the Sherman Act." (*Id.*, p. 306.)

Thereupon the Court carefully and comprehensively reviewed the language of the indictment, the opinion of the District Court and the opposing contentions of counsel with respect to the interpretation of the indictment by the District Court. And, after observing that the indictment "runs only against Colgate & Company" (*id.*, p. 302), although the offense charged is unlawful *combination*, and noting the significant fact that the indictment "*makes no reference to monopoly*" (*id.*), the Court comes to the decisive question in the case, which is, in substance, whether the indictment, as interpreted by the District Court, essentially involves the right of an indi-

vidual manufacturer, under the Sherman Act, to refuse to sell, as Colgate & Company contended, or, on the contrary, involves the right of an individual manufacturer, under that act, to sell and yet to impose and enforce an actual restraint upon the right of future alienation, i. e., an actual restraint upon the price of future sales, through restrictive agreements effected with dealers, as the Government contended. (Italics ours.) "Counsel for the Government maintain, in effect, that, as so interpreted, the indictment adequately charges an unlawful combination (within the doctrine of *Dr. Miles Medical Company* v. *Park & Sons Company*, 220 U. S., 373) resulting from restrictive agreements between defendant and sundry dealers whereby the latter obligated themselves not to resell except at agreed prices; * * * On the other hand, defendant maintains that looking at the whole opinion it (the District Court) plainly construes the indictment as alleging only recognition of the manufacturer's undoubted right to specify resale prices and refuse to deal with anyone who failed to maintain the same." (*Id.*, p. 306.)

After stating that "we are unable to accept the construction placed upon it (the opinion of the District Court) by the Government" (*id.*), this Court concluded:

(1) "As interpreted below, *the indictment does not charge* Colgate & Company with selling its products to dealers under *agreements* which obligated the latter not to resell except at prices fixed by the Company." (*Id.*, p. 307.) (Italics ours.)

(2) *The position taken by the Company that the District Court "plainly construes the indictment as alleging only recognition of* **the manufacturer's undoubted right to specify resale prices and refuse to deal with anyone who failed to maintain the same** * * * *must be accepted."* (*Id.*, pp. 306, 307.) (Italics and bold face

ours.) In support of this and the preceding conclusion the following definitive statement from the opinion of the District Court was quoted: "The pregnant fact should never be lost sight of that no averment is made of any contract or agreement having been entered into whereby the defendant, the manufacturer, and his customers, bound themselves to enhance and maintain prices, further than is involved in the circumstance that the manufacturer, the defendant here, refused to sell to persons who would not resell at indicated prices, and that certain retailers made purchases on this condition, whereas, inferentially, others declined so to do. *No suggestion is made that the defendant, the manufacturer, attempted to reserve or retain any interest in the goods sold, or to restrain the vendee in his right to barter and sell the same without restriction. The retailer, after buying, could, if he chose, give away the purchase, or sell it at any price he saw fit, or not to sell it at all; his course in these respects being affected only by the fact that he might by his action incur the displeasure of the manufacturer, who could refuse to make further sales to him, as he had the undoubted right to do.*" (*United States* v. *Colgate & Company*, 253 Fed. 522, 527.) (Italics ours.)

(3) The indictment, based upon the mere refusal by a manufacturer, engaged in an entirely private business and exercising his own independent discretion in the normal course of his own individual trade without any purpose to create or maintain a monopoly, to sell his own property to dealers for the reason that they do not charge the resale prices suggested by him, and who, when he does sell, imposes no restraint whatever upon the right of alienation of buyers by restrictive agreements, does not charge a violation of the Sherman Act. *Such refusal to sell is merely the exercise of* "**the long recognized**

right of trader or manufacturer engaged in an entirely private business freely to exercise his own independent discretion as to parties with whom he will deal,'' and to ''announce in advance the circumstances under which he will refuse to sell,'' *which fundamental right is not restricted by the Sherman Act ''in the absence of any purpose to create or maintain a monopoly,'' since ''the purpose of the Sherman Act is * * * to preserve the right of freedom to trade.''* (*Id.*, p. 307.) (Italics and bold face ours.)

> ''The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce—in a word, to preserve the right of freedom to trade. In the absence of any purpose to create or maintain a monopoly, the Act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell. 'The trader or manufacturer, on the other hand, carries on an entirely private business and can sell to whom he pleases.' *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 320. 'A retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself, and may do so because he thinks such dealer is acting unfairly in trying to undermine his trade.' *Eastern States Retail Lumber Dealers Association* vs. *United States*, 234 U. S. 600, 614. See also *Standard Oil Company* v. *United States*, 221 U. S. 1, 56; *United States* v. *American Tobacco Company*, 221 U. S. 106, 180.'' (*Id.*) (Italics ours.)

As Mr. Justice McReynolds stated, the Government

relied upon the doctrine established in the case of *Dr. Miles Medical Company* v. *John D. Park & Sons Company* (220 U. S. 373), reaffirmed in *Boston Store of Chicago* v. *American Graphophone Company et al.* (246 U. S. 8), as authority for the charge of unlawful combination in restraint of trade made in the *Colgate* case. The Government also cited the following cases, to-wit: *Bobbs-Merrill Company* v. *Straus et al.* (210 U. S. 339), *Bauer & Cie* v. *O'Donnell* (229 U. S. 1), *Straus et al.* v. *Victor Talking Machine Company* (243 U. S. 490), *Motion Picture Patents Company* v. *Universal Film Manufacturing Company et al.* (243 U. S. 502).

In these cases it was held that:

(a) *The owner of movables cannot sell them and lawfully by contract fix a price at which they shall afterwards be sold.* Such price fixing contracts are unlawful at common law and under the Sherman Act. (*Dr. Miles Medical Company* v. *John D. Park & Sons Company* and *Boston Store of Chicago v. American Graphophone Company et al., supra*). The reason of the rule is clearly stated in the *Boston Store* case: "To do so would be at one and the same time to sell and retain, to part with and yet to hold, to project the will of the seller so as to cause it to control the movable parted with when it was not subject to his will because owned by another, and thus to make the will of the seller unwarrantedly take the place of the law of the land as to such movables. It was decided (i. e., in the *Miles* case) that the power to make the limitation as to price for the future could not be exerted consistently with the prohibitions against restraint of trade and monopoly contained in the Anti-Trust Law." (*Id.*, pp. 21-22.) *That is, under the general law the owner of movables cannot grant the title thereto by sale for a full price satisfactory to him and lawfully retain the incidents of it.* (*Boston Store of Chi-*

cago v. *American Graphophone Company et al., supra; United States* v. *United Shoe Machinery Company of New Jersey et al.*, 247 U. S., 32, 58.) As Judge Lurton said in *John D. Park & Sons Company* v. *Hartman* (C. C. A., Sixth Circuit, 153 Fed., 24), approved and quoted in the *Miles* case: "The right of alienation is one of the essential incidents of a right of general property in movables, and restraints upon alienation have been generally regarded as abnoxious to public policy, which is best subserved by great freedom of traffic in such things as pass from hand to hand. General restraint in the alienation of articles, things, chattels, except when a very special kind of property is involved, such as a slave or an heirloom, has been generally held void." (*Id.*, p. 39.) We direct attention to the fact that in the *Miles* case this Court specifically and fully recognized the right of a manufacturer to sell or not, as he pleases. The decision was that while he has this complete liberty, he cannot thereby, in case he *does* sell, impose a restraint upon the price of future sales. It was a restraint upon the right of alienation of movables sold, not the right of the owner of movables to refuse to sell, that was involved. As the Court said: "But because a manufacturer is not bound to make or sell, it does not follow that in case of sales actually made he may impose upon purchasers every sort of restriction." (*Id.*, p. 404.) Again: "Moreover, every manufacturer, before sale, controls the articles he makes. With respect to these, he has the rights of ownership." (*Id.*, p. 403.) In short, the precise issue in the *Miles* case was whether the owner of a movable, who has exercised and exhausted his right to sell, whereby the movable has passed into the channels of trade and is owned by another, can lawfully impose and enforce a restraint on the price of future sales by the purchaser, through restrictive contracts. The right asserted was

not the right to sell, but the right to qualify the title of the purchaser after the sale had been made. The question presented for decision may be stated thus: Has the owner of movables the right to project his control beyond his own sale and to keep the property sold subject to a price restriction that is hostile to the title and the right of alienation incident to it, property which by his own voluntary act is no longer subject to his will, because owned by another? This Court decided, in effect, that such restraint upon the right of the buyer of movables to sell without restriction what he has purchased and owns is invalid at common law and under the Sherman Act, because inconsistent with the prohibitions against restraint of trade and monopoly contained in that Act and obnoxious to the public interest. *The vice of such price fixing contracts, the restraint of trade, is, as this Court clearly pointed out, the restraint thereby imposed upon the right and freedom of alienation of the purchaser.*

(b) *Neither the patent nor copyright law grants to the owner of a patent or copyright, respectively, the right to sell the patented or copyrighted article and to impose and enforce a restraint on the price of future sales thereof, by restrictive notice, "license contract" or otherwise.* The power to impose and enforce such a restraint in derogation of the general law is not within the monopoly conferred by said statutes. (*Bobbs-Merrill Company v. Straus et al., Bauer & Cie v. O'Donnell, Straus et al. v. Victor Talking Machine Company, Motion Picture Patents Company v. Universal Film Manufacturing Company et al., Boston Store of Chicago v. American Graphophone Company et al., supra.*)

It is manifest that both the *Miles* and *Colgate* cases rest upon *the broad principle of the right of freedom to trade,* which right, as stated, the Sherman Act was en-

acted to preserve, not to impair or destroy by invalidating its proper exercise. And in order to preserve that right it was as necessary to condemn the resale-price-fixing contracts in issue in the *Miles* case as to uphold the refusal-to-sell conduct presented in the *Colgate* case. This is obviously so for the conclusive reason that such contracts combined seller and buyers for the purpose and with the result of imposing a restraint upon the right and freedom of alienation of movables sold, to-wit, a limitation upon the price of future sales, whereas, on the contrary, such refusal-to-sell conduct involved but the independent exercise of the right of alienation of movables owned, without any purpose to create or maintain a monopoly, the liberty of buyers being unrestricted in all respects. If, on the one hand, such contracts are valid and may be lawfully effected and enforced, then the right of the buyers of the movables subject thereto freely to sell the property owned by them at any price they please is utterly destroyed. If, on the other hand, the owner of movables is denied the right freely to exercise his own independent discretion as to whom he will sell, in the absence of any purpose to create or maintain a monopoly, then his right of freedom to trade is utterly destroyed. The decisive fact is that the restraint of trade (i. e., the restraint imposed upon the price of future sales, through contracts) involved and condemned in the *Miles* case was entirely absent from the *Colgate* case. In that case the issue was confined, as here, to the validity of the mere assertion of the fundamental right of the owner of movables, engaged in an entirely private business and exercising his own independent discretion in *bona fide* transactions effected in the normal course of his own individual trade without any purpose to create or maintain a monopoly, to sell his own lawfully possessed property or not, as he pleased, to whom he pleased, to decline to sell to dealers failing to

observe resale prices suggested by him, who, when he *did* sell, did not prevent buyers from freely exercising their right to sell, by restrictive contract, but gave to each buyer a full and unqualified title, whereby each buyer received and possessed complete and unrestricted liberty of alienation with respect to the property so purchased and owned by him and was wholly free to sell it or not, as he pleased, to whom he pleased, at any price he pleased. In short, this Court distinguished the *Colgate* case from the *Miles* case *because it did not involve agreements, either express or implied, executed by Colgate & Company with its customers, purposed and effected to obligate them to adhere to resale prices fixed by the company* (id., p. 307), but only "the manufacturer's undoubted right to specify resale prices and refuse to deal with anyone who failed to maintain the same" (*id.*, p. 306). As Mr. Justice McReynolds said (pp. 307-308): "In *Dr. Miles Medical Co. v. Park & Sons Co., supra,* the unlawful combination was effected through contracts which undertook to prevent dealers from freely exercising the right to sell." Colgate & Company did not engage in a combination, because it acted alone and independently and dealt with each customer separately in the normal course of its own individual trade. The company effected no restraint of trade, because it imposed no restraint whatever upon the right of future alienation, by restrictive agreement, in the case of products sold. The company conducted its business without any purpose to maintain or create a monopoly. Wherein, then, was its refusal-to-sell policy an offence against the Sherman Act?

In the recent case of *United States v. A. Schrader's Son, Inc.*, 252 U. S. 85, the question was squarely presented whether the decision in the *Colgate* case modified or overruled the doctrine announced by the *Miles* case.

And this Court held that it did not and again explained the fundamental distinction between the two cases, to which we have referred. In the *Schrader* case the District Court sustained a demurrer to an indictment charging that a manufacturer of automobile tire accessories engaged in a combination in restraint of the interstate trade in its products by executing contracts with its customers fixing their resale prices with respect to such products, upon the ground, in substance, that the indictment neither charged nor recited facts from which it could be properly inferred that the manufacturer effected such contracts with the purpose to monopolize interstate trade in the products subjelt to them, holding that the decision in the *Colgate* case authorized that conclusion, notwithstanding the distinction clearly established by this Court between that case and the *Miles case.* (*United States v. A. Schrader's Son, Inc.,* 264 Fed. 175.) In the course of its opinion the District Court said (pp. 182, 183, 184, 185):

> "Defendant urges that there is a manifest inconsistency between the reasoning, if not between the holdings, of these two cases (*Dr. Miles Medical Co. v. Park & Sons Co.,* 220 U. S. 373, and *United States v. Colgate Co.,* 250 U. S. 300); that if the basic principles announced in the latter case are to be taken in the ordinary sense imparted by the language the present case falls within the *Colgate Case;* and that, properly construed, neither section 1 nor 2 of the Sherman Anti-trust Law makes the defendants' conduct a crime.
>
> "The *Dr. Miles Medical Co. Case,* standing alone, would seem to require that this demurrer be overruled, and a holding that the Sherman Anti-trust Law is violated and a crime committed, merely upon a showing of the making by defendant and two or more jobbers of the agreements set up in the indictment, certainly if the jobbers were competitors in the same territory. That case has been

frequently cited as establishing this proposition. * * *

"Personally, and with all due respect, permit me to say that I can see no real difference upon the facts between the *Dr. Miles Medical Co. Case* and the *Colgate Co. Case*. The only difference is that in the former the arrangement for marketing its product was put in writing, whereas in the latter the wholesale and retail dealers observed the prices fixed by the vender. This is a distinction without a difference. The tacit acquiesence of the wholesalers and retailers in the prices thus fixed is the equivalent for all practical purposes of an express agreement. ***

"Section 1 of the Sherman Anti-Trust Act is not limited to contracts in restraint of trade. It includes any combination or conspiracy having for its object a restraint of interstate trade or commerce. Any subterfuge, device, indirect acts, which brings about cooperation to accomplish a predetermined purpose will amount to a conspiracy. In the *Colgate Case* the predetermined purpose of the matter, known to all the wholesalers and retailers, was to market a product at certain fixed prices. Every wholesale or retail dealer who acquiesced therein or acted in furtherance of the accomplishment of that purpose made himself a member of a conspiracy. It matters little, it seems to me, whether the maker exacted a written agreement to resell at certain fixed prices before selling to a wholesale or retail dealer, or only sells to such wholesale and retail dealers who do in fact, with knowledge of the intent and purpose of the maker, buy and continue to buy and sell at such fixed prices. Granting the fundamental proposition stated in the *Colgate Case*, that the manufacturer has an undoubted right to specify resale prices and refuse to deal with any one who fails to maintain the same, or, as further stated, the act does not restrict the long-recognized right of a

trader or manufacturer engaged in an entirely private business freely to exercise his own independent discretion as to parties with whom he will deal, and that he of course may announce in advance the circumstances under which he will refuse to sell, it seems to me that it is a distinction without a difference to say that he may do so by the subterfuges and devices set forth in the opinion and not violate the Sherman Anti-Trust Act, yet if he had done the same thing in the form of a written agreement, adequate only to effectuate the same purpose, he would be guilty of a violation of the law. Manifestly, therefore, the decision in the *Dr. Miles Medical Case* must rest upon some other ground than the mere fact that there were agreements between the manufacturer and the wholesalers.

"That further ground, it seems to me, is pointed out in the *Colgate Case* and in the quotations heretofore made from the *Dr. Miles Medical Co. Case.* There must be a purpose to create and maintain a monopoly, and the acts charged in the indictment must be sufficient to show that there was effective means adopted to create and maintain a monopoly; otherwise the right of the trader or manufacturer to specify resale prices and refuse to deal with any one who fails to maintain the same is of necessity destroyed. ***

"The point, however, which I wish to emphasize, is that the allegations of this indictment, not alleging any purpose, or facts from which such a purpose can be inferred, to monopolize interstate trade, within the prohibition and meaning of section 2 of the Sherman Anti-Trust Act and the last clause of section 2 of the Clayton Act, does not charge a crime under section 1 of the Sherman Anti-Trust Act as that act should be construed."

This Court reversed the judgment of the District Court and, speaking through Mr. Justice McReynolds, said:

"The court below misapprehended the meaning and effect of the opinion and judgment in that cause (the *Colgate* case). We had no intention to overrule or modify the doctrine of *Dr. Miles Medical Co. v. Park & Sons Co.*, where the effort was to destroy the dealers' independent discretion through restrictive agreements. Under the interpretation adopted by the trial court and necessarily accepted by us, the indictment failed to charge that Colgate & Comapny made agreements, either express or implied, which undertook to obligate vendees to observe specified resale prices; and it was treated 'as alleging only recognition of the manufacturer's undoubted right to specify resale prices and refuse to deal with any one who failed to maintain the same.'

"It seems unnecessary to dwell upon the obvious difference between the situation presented when a manufacturer merely indicates his wishes concerning prices and declines further dealings with all who fail to observe them, and one where he enters into agreements—whether express or implied from a course of dealing or other circumstances—with all customers throughout the different States which undertake to bind them to observe fixed resale prices. In the first, the manufacturer but exercises his independent discretion concerning his customer and there is no contract or combination which imposses any limitation on the purchaser. In the second, the parties are combined through restrictive agreements designed to take away dealers' control of their own affairs and thereby destroy competition and restrain the free and natural flow of trade amongst the States.

"The principles approved in *Dr. Miles Medical Co. v. Park & Sons Co.* should have been applied." (*United States v. A. Schrader's Son, Inc.*, 252 U. S. 85, 99-100.)

We may pause here to remark that in the *Miles* case the combination was condemned, although the Court had

to assume that the prices fixed were reasonable. (*Id.*, p. 412.) In the *Colgate* case, although the District Court interpreted the indictment as containing no suggestion that the resale prices indicated by Colgate & Company were other than fair and reasonable in all respects, this Court did not deem it necessary to advert to that fact, since the fundamental right of refusal involved is, of course, entirely independent of the character of the prices indicated.

The *Colgate* case conclusively establishes the proposition now under consideration. The fact that the *Colgate* case does not involve the refusal by a manufacturer to sell to dealers for the particular reason that they resell to other dealers who do not charge the prices suggested by him, but only involves the refusal by a manufacturer to sell to dealers for the reason alone that they do not charge the prices suggested by him, is entirely immaterial and in no way qualifies the doctrine and authority of that case. This is so because the essential conduct effected in each instance is *the refusal to sell* and this Court held, in effect, that the individual manufacturer, engaged in a private business and exercising his own independent discretion, has the *undoubted right* so to refuse to sell for any reason satisfactory to him, that such right is not restricted by the Sherman Act in the absence of any purpose to create or maintain a monopoly. It follows that this case cannot be distinguished from the *Colgate* case on the ground that it involves an additional reason for the refusal.

The business and the merchandising policy and conduct in issue here are essentially identical with the business, policy and conduct presented in the *Colgate* case, because—

(1) The Beech-Nut Packing Company—as is Colgate & Company—is a single manufacturer of movables, en-

gaged in an entirely private business free from any suggestion of actual, potential or attempted monopoly, producing and selling at its peril in an open, free and highly competitive market, and under no special legal or moral obligation either to make or sell by reason of the character or nature of its business.

(2) The Beech-Nut Packing Company effects—as did Colgate & Company—the *general* merchandising policy of selling its own products to its own customers in *bona fide* transactions in the normal course of trade, dealing with each individual customer directly, separately and independently. There is no concerted action or agreement between the Company and its competitors, between the Company and its customers collectively, or between the customers themselves.

(3) The Beech-Nut Packing Company effects—as did Colgate & Company—the *specific* merchandising policy of selling its own products only to such dealers who are known or believed by it to be desirable and satisfactory customers, dealers who are known or believed by it to be fair, efficient and successful distributors of Beech-Nut products. That is, the Company selects its own customers and sells or not, as it pleases, and to whom it pleases, always acting alone and exercising its own independent discretion and its own best judgment, without any purpose to create a monopoly.

(4) The Beech-Nut Packing Company effects—as did Colgate & Company—the following conduct, to-wit: It refuses to sell to dealers for the reason that they do not charge the resale prices suggested by it, prices which are, in its judgment, entirely reasonable and essential to fair and efficient trade. In addition, it refuses to sell to dealers for the reason that they resell to other dealers who do not charge such prices. (A refusal to sell for the latter

reason was not involved in the *Colgate* case, an immaterial variation in fact, as we have shown.) The Company believes that dealers who do not charge fair and reasonable prices in the resale of Beech-Nut products are acting contrary to the best interests of itself, the distributing trade and the public generally.

(5) The Beech-Nut Packing Company *does not* impose and enforce or attempt to impose and enforce—as Colgate & Company did not—any restraint whatever upon the right of future alienation in the case of products actually sold, i. e., any restraint upon the right of its buyers to sell the products bought and owned by them at any price they please and to whom they please, through restrictive agreements or contracts or otherwise. It claims and asserts the right alone to sell or not, as it pleases, to whom it pleases, for reasons satisfactory to it. But, when it *does* sell, it gives to each buyer a full and unqualified title. Sales made are absolute. Each buyer receives and possesses complete and unrestricted liberty of alienation and is entirely free to sell at any price and to any person he pleases. If he resells at the prices suggested by the Company it is because he himself voluntarily elects and prefers to do so for a reason satisfactory to him. The only restraint imposed by the Company upon dealers is the denial to them of the ability to buy, unless it chooses to sell, a restraint quite different in fact and law from that imposed upon the right of alienation in the case of products sold. There is involved here, as in the *Colgate* case, merely the refusal to sell movables owned, not a restraint upon the right of alienation of movables sold.

In short, the essential conduct in issue in the instant case, viz., the refusal by a manufacturer to sell his own property, is precisely that involved and approved in the *Colgate* case, and effected under substantially the

same circumstances and with the same economic result. Applying the doctrine announced by this Court in that case, it must be concluded that—

1. *The Beech-Nut Packing Company does not create or engage in an unlawful combination with its dealers in restraint of trade, by reason of its said refusal-to-sell conduct.* There is no combination, because the Company always acts alone and independently and deals with each customer separately in the normal course of its own individual trade. There is no restraint of trade, because the Company imposes and enforces no restraint whatever upon the right of future alienation by restrictive agreements, in the case of products sold. And there is no purpose to create or maintain a monopoly.

2. *The Beech-Nut refusal-to-sell conduct merely involves the lawful exercise of an undoubted right, viz.,* "the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal" and to "anonunce in advance the circumstances under which he will refuse to sell." (Id., p. 307.)

3. *The Beech-Nut refusal-to-sell conduct is not unlawful at common law or under the Sherman Act.* The Sherman Act does not restrict such exercise of this fundamental right of refusal "in the absence of any purpose to create or maintain a monopoly," since it is the very purpose of that Act "to preserve the right of freedom to trade" firmly established under the common law, and not to impair or destroy it. (Id.)

We are thus brought to a brief review of the remaining cases cited.

The *Tea Company* case (supra) presented this situation, viz.,: The Cream of Wheat Company is engaged in

the business of putting up and selling selected purified middlings under the name of "Cream of Wheat." "Middlings" are the coarse flour and fine bran separated by bolting from fine flour and coarse bran. They are produced by all wheat flour mills and constitute a staple product regularly quoted and sold in all grain markets. The quantity of middlings annually used by the Company amounts to less than 1 per cent. of the total quantity of middlings annually produced in the United States. The Company announced and effected the merchandising policy of confining its sales exclusively to wholesalers, refusing to sell to either consumers or retailers, with the exception hereinafter noted, to whom it charged two prices, to-wit, $3.95 per case in carload lots and $4.10 per case in less-than-carload lots. To each wholesale purchaser it sent a circular requesting such purchaser to sell to the retail trade only at a price of $4.50 per case, adding to this request the statement that it did not intend to waive the right to refuse at any time to supply any dealer who failed to comply with any request made by it, the infringement of which it might deem prejudicial to its own business, the trade at large and the interests of the consumer. Sales once made, however, were absolute and the transaction was closed. Sale was to imply no agreement to maintain or fix any price on a resale. The Company merely requested that resales be kept at the level recommended by it. The Great Atlantic & Pacific Tea Company is a large retailer of grocery products, operating a chain of so-called "Economy Stores." Notwithstanding the announced policy of confining its sales to wholesalers, the Cream of Wheat Company sold directly to the Tea Company, for a time, at wholesale rates and in large quantities, with the request that, in making sales over the counter, no smaller price be charged than the small retailer must ask in order to get a fair profit, viz., not less

than 14 cents the package. After a time, however, the Tea Company refused to observe this request and sold "Cream of Wheat" in its "Economy Stores" at 12 cents per package. As a result the Cream of Wheat Company refused to make further sales to the Tea Company at any price or in any quantity whatever. Thereupon the Tea Company sought an injunction under the Clayton Act (38 Stat., 730, c. 323, Section 16) restraining the Cream of Wheat Company from refusing to sell its products to the Tea Company. The motion for the injunction was denied by the District Court and an order was entered accordingly. Upon appeal, the Circuit Court of Appeals for the Second District unanimously affirmed said order, Judge Lacombe delivering the opinion. The Tea Company contended that the manufacturer's course of conduct was "a violation of the Sherman Anti-Trust Act and that under the recent Clayton Act this suit may be instituted and maintained" by it. (Id., p. 47.) After noting that "this suit is really brought to force defendant to continue to sell to this single retailer, as it sells to the wholesalers who trade with it" (id., p. 48), that "there was no contract between the two which bound defendant to sell to complainant for any specified period of time" (id.), that "the business of defendant is not a monopoly, or even a quasi-monopoly" (id.), and after stating that it is not necessary to consider and determine the question whether this suit is authorized by the Clayton Act, the Court decided that "complainant is not entitled to the relief now asked for" (id., p. 47), since "certainly it is no offense against common law, statutes, public policy, or good morals for a trader to confine his sales to persons who will buy from him in large quantities" (id.), i. e., to wholesalers, and "there is nothing unusual about such a course of business" (id.).

"Defendant, as we have seen, in the conduct of

its business, decided and made announcement to the trade that for reasons sufficient to itself it would sell only to wholesalers. Why, if it chose to do so, it could not make such a rule and adhere to it, we are at a loss to understand. * * * Much has been said about the reason why defendant ceased to treat complainant as an exception to its rule; failure of the latter to live up to some arrangement, etc. All that seems to be wholly immaterial. The business of defendant is not a monopoly, or even a quasi-monopoly. Really, it is selling purified wheat middlings, and its whole business covers only about 1 per cent. of that product. It makes its own selection of what by-products of the milling process it will put up, and sells what it puts up under marks which tell the purchaser that these middlings are its own selection. It is open to Brown, Jones and Robinson to make their selections out of the other 99 per cent. of purified middlings and put them up and sell them; possibly one or more of them may prove to be better selectors than defendant, or may persuade the public that they are. It is difficult to see how into such a business as that any novel and exceptional rule of law is to be imported. *We had supposed that it was elementary law that a trader could buy from whom he pleased and sell to whom he pleased and that his selection of seller and buyer was wholly his own concern. 'It is a part of a man's civil rights that he be at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason or is the result of whim, caprice, prejudice or malice.' Cooley on Torts,* p. 278. See also our own opniion in *Greater New York Film Co. v. Biograph Co.*, 203 Fed., 39, 121 C. C. A. 375.

"*Before the Sherman Act it was the law that a trader might reject the offer of a proposing buyer for any reason that appealed to him; it might be because he did not like the other's business methods, or because he had some personal difference with him—political, racial or social. That was purely his own affair, with which nobody else had*

> *any concern. Neither the Sherman Act nor any decision of the Supreme Court construing the same, nor the Clayton Act, has changed the law in this particular.* WE HAVE NOT YET REACHED THE STAGE WHERE THE SELECTION OF A TRADER'S CUSTOMERS IS MADE FOR HIM BY THE GOVERNMENT." (Id., pp. 48, 49.) (Italics and capitals ours.)

The *Cudahy Packing Company* case (supra) presented the question whether a refusal-to-sell conduct similar to that involved in the *Colgate* case constitutes an offense against the Sherman and Clayton Acts. The Circuit Court of Appeals for the Fourth Circuit held that it did not, applying the doctrine announced by the Supreme Court in that case. Judge Woods delivered the opinion of the Court and said:

> "The vital question is whether defendant's method of business complied with the acquiescence of its customers therein by observing its requests or demands to maintain prices was such co-operation between seller and purchasers as amounted to a combination in restraint of trade within the rule laid down in Dr. Miles Medical Company v. Park & Sons Company, 220 U. S. 373, and other following cases. *We are obliged to hold that the question has been clearly answered in the negative by the Supreme Court in United States of America v. Colgate & Company, decided June second,* 1919. *The Court expressly held that the announcement in advance that customers were expected to charge a price fixed by the seller and that the penalty for refusal to maintain prices would be refusal to sell to the offending customer, observance of the request to maintain prices by customers generally, and the actual enforcement of the penalty by refusal to sell to such customers as failed to maintain the price, did not constitute a violation of the anti-trust statute. Nothing more was done by the defendant and its customers in this case.*

"Since the defendant, under the Colgate case, merely exercised the right reserved by the Clayton Act to dealers of 'selecting their own customers in bona fide transactions, and not in restraint of trade,' the plaintiff cannot recover under its charge of unlawful discrimination in price." (Id., p. 67.) (Italics ours.)

II.

LIKEWISE, SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT DOES NOT DEPRIVE A MANUFACTURER OR TRADER, ENGAGED IN AN ENTIRELY PRIVATE BUSINESS AND EXERCISING HIS OWN INDEPENDENT DISCRETION IN THE NORMAL COURSE OF HIS OWN INDIVIDUAL TRADE WITHOUT ANY UNLAWFUL PURPOSE (A PURPOSE EITHER OPPOSED TO GOOD MORALS BECAUSE CHARACTERIZED BY FRAUD, DECEPTION, MISREPRESENTATION, BAD FAITH, INTIMIDATION, OPPRESSION, OR SOME OTHER SUCH WRONGFUL ELEMENT, OR AGAINST PUBLIC POLICY BECAUSE INVOLVING UNDUE RESTRAINT OF TRADE OR MONOPOLY, ACTUAL OR POTENTIAL, OR THE DOING OF ANY ACT OTHERWISE PROHIBITED BY LAW), OF HIS FUNDAMENTAL RIGHT OF FREEDOM TO TRADE, EXISTING AT COMMON LAW, TO-WIT, THE RIGHT FREELY TO SELL HIS OWN LAWFULLY POSSESSED PROPERTY (LEGITIMATE ARTICLES OF COMMERCE) OR NOT, AS HE PLEASES, FOR ANY REASON HE PLEASES, TO WHOM HE PLEASES, AND TO ANNOUNCE IN ADVANCE THE CIRCUMSTANCES UNDER WHICH HE WILL REFUSE TO SELL, WHO, WHEN HE DOES SELL, IMPOSES NO RESTRAINT WHATEVER UPON THE RIGHT OF FUTURE ALIENATION, BY RESTRICTIVE AGREEMENTS (EXPRESS OR IMPLIED), SINCE THAT ACT, AS IN THE CASE OF THE COMPANION CLAYTON ACT, WAS ENACTED TO SUPPLEMENT AND STRENGTHEN THE SHERMAN ACT, AND THUS MORE COMPLETELY AND EFFECTUALLY TO PRESERVE AND PROTECT SUCH FUNDAMENTAL RIGHT OF FREEDOM TO TRADE, AND NOT TO IMPAIR OR DESTROY IT.

1. *The companion Clayton Act, likewise enacted to supplement the Sherman Act, expressly recognizes and affirms the right of a private manufacturer or trader independently to select his own customers in bona fide transactions and not in restraint of trade.* The Clayton Act (38 Stat. 730), entitled "An Act to supplement ex-

isting laws against unlawful restraints and monopolies, and for other purposes," *inter alia*, prohibits certain practices where their effect may be to substantially lessen competition or tend to create a monopoly in any line of commerce among the several States, etc. Section 2 defines and prohibits unlawful discrimination in price between purchasers. It provides:

> "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: *Provided*, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition: *And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade.*"

There can be no doubt whatever that Congress deliberately inserted the last proviso to prevent precisely what is attempted in the instant case with respect to Section 5 of the Federal Trade Commission Act, to-wit, that construction and enforcement of Section 2 which

result in the impairment or destruction of the very right of freedom to trade which it was enacted more securely to preserve.

The Federal Trade Commission Act was approved on September the 26th, 1914. The Clayton Act was approved on October the 15th, 1914. Both acts were simultaneously considered by Congress. They composed a single and harmonious legislative program and were enacted for the same purpose, viz., to supplement and strengthen the Sherman Act, to make the policy, principle and enforcement of that act more effectual, and more securely to preserve and safeguard the fundamental right of freedom to trade, existing at common law. We ask: Is it reasonable to conclude that a right specifically reserved by the Clayton Act is impaired or destroyed by the companion Trade Commission Act, a right which both acts were expressly enacted more completely to secure and protect?

2. [1] *A review of the genesis and history of the enactment of the Federal Trade Commission Act conclusively establishes that the great remedial purpose contemplated by Congress in passing it is that stated, to-wit, to supplement and strengthen the Sherman Act, and thus more completely and effectually to preserve and protect the fundamental right of freedom to trade, existing at common law.* It is well settled that this Court may consult the reports of committees of the House or Senate with respect to a bill when pending in Congress, and also the explanatory statements in the nature of a supplemental report made by the committee member in charge of it during the course of its consideration by Congress, in order to discover the motive of Congress in passing the bill and to arrive at the true meaning of the language employed in the statute, where such meaning is obscure or doubtful. (*United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 318; *Binns* v. *United States*,

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(1) See Appendix.

194 U. S. 486, 495; *McLean* v. *United States*, 226 U. S. 374, 380; *Pennsylvania Railroad Co.* v. *International Coal Co.*, 230 U. S. 184, 198-199; *Lapina* v. *Williams*, 232 U. S. 78, 90; *United States* v. *Coca Cola Co.*, 241 U. S. 265, 281; *Caminetti* v. *United States*, 242 U. S. 470, 490; *United States* v. *St. Paul, Minneapolis and Manitoba Railway Co.*, 247 U. S. 310, 318; *Duplex Printing Press Co.* v. *Deering et al.*, decided January 3rd, 1921.) "Although debates may not be used as a means for interpreting a statute (*United States* v. *Trans-Missouri Freight Association*, 166 U. S. 318, and cases cited) that rule in the nature of things is not violated by resorting to debates as a means of ascertaining the environment at the time of the enactment of a particular law, that is, the history of the period when it was adopted." (*Standard Oil Co.* v. *United States*, 221 U. S. 1, 50.) In *Texas & Pacific Railway Co.* v. *Interstate Commerce Commission*, 162 U. S. 197, it was said (pp. 218-219): "Even in construing the terms of a statute, courts must take notice of the history of legislation, and, out of the different possible constructions, select and apply the one that best comports with the genius of our institutions and, therefore, most likely to have been the construction intended by the law-making power."

(1) A careful examination of the official reports and statements made in Congress in connection with the introduction and consideration of the Federal Trade Commission bill (H. R. 15613, 63rd Cong., 2d Sess.), and of the debates thereon, clearly discloses the causes which led to its enactment, the motive of Congress in passing it, and the great remedial purpose contemplated by the act, as a whole, and by Section 5, in particular, to-wit:

> (a) *The Federal Trade Commission Act, as a whole, was purposed to supplement and strengthen transportation, viz., unfair methods of competi- enforcement of that statute more effectual.* Con-

(1) See Appendix.

gress thereby intended to enforce a more complete and certain realization of the fundamental right of freedom to trade, existing at common law, which right the Sherman Act established as the law of the land, and thus more securely to preserve, maintain and protect competition from violence and destruction through restraint of trade and monopoly. (b) *The fundamental purpose of Section 5 of that act is to prevent the use of the means whereby restraint of trade and monopoly, prohibited by the Sherman Act, are most effectively created and maintained, as experience has indicated, in the absence of control of a natural resource or of transportation, viz.. unfair methods of competition, and thus to stop restraint of trade and monopoly at the threshold, or as one Senator put it, "to nip restraint of trade and monopoly in the bud,"—is a word, more completely to sustain and safeguard the common law right of freedom to trade.* Congress plainly intended through this section to reach and strike down those unfair methods of competition which violate the rights of competitors, contrary to the public welfare, tend toward and ultimately result in the destruction of competition and the introduction of restraint of trade and monopoly, which methods, however, do not separately and of themselves amount to an offense against the Sherman Act. The long experience of the enforcement of that act clearly demonstrated the real need for such a supplemental statute in order to destroy the chief source and weapon of monopoly and to liberate commerce from the menace of *threatened and incipient* restraint of trade and monopoly, just as the Sherman Act had liberated it from the menace of *actual* restraint of trade and monopoly. It was found that the existing anti-trust law was deficient in this respect. Is short, the main cause

which led to this legislation was the thought that it was required by the economic conditions of the times, that is, *it was required more effectually to maintain the common law right of the individual to freedom to trade and more securely to protect the free exercise of that right from threatened and actual destruction by the evil economic forces of restraint of trade and monopoly.*

In the course of his dissenting opinion in *Federal Trade Commission* v. *Gratz et al.*, 253 U. S. 421, Mr. Justice Brandeis, discussing the proceeding prescribed by Section 5, said:

> "The proceeding is thus a novelty. It is a new device in administrative machinery, introduced by Congress in the year 1914, in the hope thereby of remedying conditions in business which a great majority of the American people regarded as menacing the general welfare, and which for more than a generation they had vainly attempted to remedy by the ordinary processes of law. It was believed that widespread and growing concentration in industry and commerce restrained trade and that monopolies were acquiring increasing control of business. Legislation designed to arrest the movement and to secure disintegration of existing combinations had been enacted by some States as early as 1889. In 1890 Congress passed the Sherman Law. It was followed by much legislation in the States [1] and many official investigations. Between 1906 and 1913 reports were made by the Federal Bureau of Corporations of the investigations into the petroleum industry, the to-

"(1) See Laws on Trusts and Monopolies. Compiled under direction of the Clerk of the House Committee on the Judiciary, 63d Cong., by Nathan B. Williams. Revised January 10, 1914; also Trust Laws and Unfair Competition (Federal) Bureau of Corporations, March 15, 1915."

bacco industry, the steel industry and the farm implement industry. A special committee of Congress investigated the affairs of the United States Steel Corporation. And in 1911 this Court rendered its decision in *Stndard Oil* v. *United States*, 221 U. S. 1, and in *United States* v. *American Tobacco Co.*, 221 U. S. 106. The conviction became general in America, that the legislation of the past had been largely ineffective. There was general agreement that further legislation was desirable. But there is a clear division of opinion as to what its character should be. Many believed that concentration (called by its opponents monopoly) was inevitable and desirable; and these desired that concentration should be recognized by law and be regulated. Others believed that concentration was a source of evil; that existing combinations could be disintegrated, if only the judicial machinery were perfected; and that further concentration could be averted by providing additional remedies, and particularly through regulating competition. The latter views prevailed in the Sixty-third Congress.(1) The Clayton Act (October 15, 1914, c. 323, 38 Stat. 730) was framed largely with a view to making more effective the remedies given by the Sherman Law. The Federal Trade Commission Act (September 26, 1914, c. 311, 38 Stat. 717) created an administrative tribunal, largely with a view to regulating competition.

"(1) See Report of Senate Committee on Interstate Commerce, June 13, 1914, 63d Cong., 2d sess., No. 597, p. 10, reporting the bill:

'Some would found such a Commission upon the theory that monopolistic industry is the ultimate result of economic evolution and that it should be so recognized and declared to be vested with a public interest and as such regulated by a commission. This contemplates even the regulation of prices. Others hold that private monopoly is intolerable, unscientific, and abnormal, but recognize that a commission is a necessary adjunct to the preservation of competition and to the practical enforcement of the law. * * *

'The commission which is proposed by your committee in the bill submitted is founded upon the latter purpose and idea.'"

"Many of the duties imposed upon the Trade Commission had been theretofore performed by the Bureau of Corporations. That which was in essence new legislation was the power conferred by §5. The belief was widespread that the great trusts had acquired their power, in the main, through destroying or overreaching their weaker rivals by resort to unfair practices.(1) As Standard Oil rebates led to the creation of the Interstate Commerce Commission,(2) other unfair methods of competition, which the investigations of the trusts had laid bare, led to the creation of the Federal Trade Commission: It was hoped that as the former had substantially eliminated rebates —the latter might put an end to all other unfair trade practices;—and that it might prove possible thereby to preserve the competitive system. It was a new experiment on old lines; and the machinery employed was substantially similar." (*Id.*, p. 432 ff.)

3. *The fundamental remedial purpose contemplated by Congress in enacting the Federal Trade Commission Act, hereinbefore defined, is plainly and unmistakably declared by the act itself.* The act is its own best interpreter. It will be observed that: The Commission is empowered (a) to prevent the use of unfair methods of competition in interstate commerce (Section 5); (b) upon the direction of the President or either House of Congress, to investigate and report the facts relating to any alleged violation of the antitrust acts by any corporation (Section 6, d); (c) upon the application of the Attorney General, to investigate and make recommendations for the readjustment of the business of any corporation al-

"(1) See 'Unfair Competition,' by William S. Stevens, Political Science Quarterly (1914), p. 283; 'The Morals of Monopoly and Competition' (1916), by H. B. Reed."

"(2) See Railway Problems, by William Z. Ripley (1907), p. x."

leged to be violating the antitrust acts in order that it may thereafter maintain its organization and conduct its business in accordance with law (Section 6, e); (d) upon its own initiative or upon the application of the Attorney General, to investigate the manner in which final decrees under the antitrust acts are being carried out (Section 6, c); (e) upon the application of the court, to ascertain and report an appropriate form of decree in a suit in equity brought by or under the direction of the Attorney General under the antitrust acts, the Court being of the opinion that the complainant is entitled to relief (Section 7); (f) to investigate corporate organizations and conduct (Section 6, a and b), etc. Further, the Commission is authorized to enforce compliance with Sections 2, 3, 7 and 8 of the Clayton Act, relating to price discrimnation between parchasers, tying contracts, intercorporate stockholding, and interlocking directorates, respectively, where the effect may be to substantially lessen competition or tend to create a monopoly. (Section 11, Clayton Act.)

It is self-evident that fair competition is essential to the preservation of free competition. To preserve the right of freedom to trade, it is necessary to outlaw unfair methods of competition and to prevent their use, as experience has proven. The ruthless practices of brutal commercial warfare, involving, not competition, in the proper meaning of that term, but a purpose, enforced by power, deliberately and wantonly to crush weaker competitors and to destroy their business, and thus, in disregard and violation of the rights of others, to "murder" all competition, inevitably result in the destruction of the right of freedom to trade and compete. And it was to protect the right of freedom to trade from violence through the use of those competitive methods which constitute the means whereby undue restraint of trade and monopoly are created and maintained that Section 5 was enacted.

4. *It is manifest upon the very face of Section 5, construed in harmony with its plain language and import and in the light of reason, practical common sense and the public policy it embodies, in order to effect its great remedial purpose more completely and securely to preserve and safeguard the fundamental right of freedom to trade and compete, existing at common law, and to eliminate the evils against which it is directed, that, in the absence of any such unlawful purpose, the mere assertion by a manufacturer or trader, engaged in an entirely private business and exercising his own independent discretion in the normal course of his own individual trade, of such fundamental right of freedom to trade, to-wit, the right freely to sell his own lawfully possessed property (legitimate articles of commerce) or not, as he pleases, for any reason he pleases, to whom he pleases, and to announce in advance the circumstances under which he will refuse to sell, does not constitute as "unfair method of competition" within the meaning of that section, any more than it constitutes "unfair competition" at common law.* (*Federal Trade Commission* v. *Gratz et al.*, 253 U. S. 421; *United States* v. *A. Schrader's Son, Inc.*, 252 U. S. 85; *United States* v. *Colgate & Co.*, 250 U. S. 300; *Standard Oil Co.* v. *United States*, 221 U. S. 1, 42-43, 56; *United States* v. *American Tobacco Co.*, 221 U. S. 106, 180, 181-182.) *Moreover, Section 11 of the Federal Trade Commission Act expressly provides and positively directs, in effect, that Section 5 shall not be construed to impair or destroy the fundamental right of freedom to trade existing at common law and preserved by the Sherman Act.*

(a) [1] Under the common law the right of freedom to trade is complete, subject, of course, to the limitations

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[1] See Trust Laws and Unfair Competition, Chapter VII, page 332, etc., entitled "Unfair Competition at the Common Law," issued by the Bureau of Corporations, Department of Commerce, March 15, 1915.

necessarily imposed by the equal right of others and required by the paramount interest of the common good and the general public welfare. Every person has a right to engage in a legitimate business and to strive by all lawful means to advance and protect his own proper interests therein. In the absence of any such wrongful or unlawful purpose, a private manufacturer or trader has always had the undoubted right to exercise his own independent discretion as to whether and to whom he will sell, to exercise his own independent and reasonable discretion with respect to his own business methods.

> "His (the trader's) right to trade freely is a right which the law recognizes and encourages, * * *." (Bowen, L. J., in *Mogul Steamship Co.* v. *McGregor, Gow, & Co.*, 23 Q. B. D. 598, 614.)
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> "From the review just made it clearly results that outside of restrictions resulting from the want of power in an individual to voluntarily and unreasonably restrain his right to carry on his trade or business and outside of the want of right to restrain the free course of trade by contracts or acts which implied a wrongful purpose, *freedom to contract and to abstain from contracting and to exercise every reasonable right incident thereto became the rule in the English law.*" (*Standard Oil Company* v. *United States*, 221 U. S., 1, 56.) (Italics ours.)
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> "'Every man has a right to determine what branch of business he will pursue, and to make his own contracts with whom he pleases, and on the best terms he can. He may change from one occupation to another, and pursue as many different occupations as he pleases, and competition in business is lawful. *He may refuse to deal with any man or class of men;* * * * Freedom is the policy in this country.'" (*Cooley on Torts*, Vol. 2, pp. 596, 597, quoting from opinion of Chapman, Ch. J., in *Carew* v. *Rutherford*, 106 Mass. 1, 13, 8 Am. Rep. 287.)

The right to trade and compete is, of necessity, qualified by the existence of a similar and equal right in others to the extent, at least, that each trader is under a legal duty so to conduct his own business as not unnecessarily or unfairly to injure the business of a competitor. The principle that underlies the maxim *sic utere tuo ut alienum non laedas* applies.

> "The parties are competitors in this field; and, on fundamental principles, applicable here as elsewhere, when the rights or privileges of the one are liable to conflict with those of the other, each party is under duty so to conduct its own business as not unnecessarily or unfairly to injure that of the other. *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U. S. 229, 254." (*International News Service* v. *Associated Press,* 248 U. S. 215, 235-236.)

Competition necessarily involves rivalry between two or more traders of the same class to secure the same thing, viz., the custom and patronage of the public. The success of one trader inevitably results in some loss of custom by another and competing trader. Loss of custom, however, due alone to mere competition, to the lawful exercise by another of his right to trade, does not constitute an actionable injury under the common law, any more than it affords a basis for a proceeding under the act. The right lawfully to trade and compete in business is a perfect defense against any charge that such injury was inflicted wantonly or without cause.

Under the common law, a manufacturer or trader has a right to be protected from injury to his business flowing from *unfair competition* effected by another. Obviously the question of what is *unfair competition,* as in the case of the question of what is an "unfair method of competition" under the act, must be determined with particular reference to the character and circumstances of the business. (*International News Service* v. *Associated Press,*

supra, p. 236.) In illustration of the conception of *unfair competition* under the common law we note:

(1) In the course of his dissenting opinion in the *International News Service* case (*supra*), Mr. Justice Brandeis said:

> "The unfairness in competition which hitherto has been recognized by the law as a basis for relief, lay in *the manner or means of conducting the business; and the manner or means held legally unfair, involves either fraud or force or the doing of acts otherwise prohibited by law.* In the 'passing off' cases (the typical and most common case of unfair competition), the wrong consists in fraudulently representing by word or act that defendant's goods are those of plaintiff. See *Hanover Milling Co.* v. *Metcalf*, 240 U. S., 403, 412-413. In the other cases, the diversion of trade was effected through physical or moral coercion, or by inducing breaches of contract or of trust or by enticing away employees. In some others, called cases of simulated competition, relief was granted *because defendant's purpose was unlawful; namely, not competition but deliberate and wanton destruction of plaintiff's business.*" (*Id.*, p. 258.) (Italics ours.)

(2) The competitive methods held by the English and American courts to involve *unfair competition* under the common law have been authoritatively classified thus:

> (a) inducing breach of competitor's contracts; (b) enticing employees from the service of competitors; (c) betrayal of trade secrets; (d) betrayal of confidential information; (e) appropriation of values created by competitors' expenditures; (f) defamation of competitors and disparagement of competitors' goods; (g) misrepresentation by means other than words; (h) false claims to testimonials; (i) intimidation of competitors'

customers by threats of infringement suits; (j) combinations to cut off competitors' supplies or to destroy their market; (k) intimidation, obstruction and molestation of competitors or their customers; (l) preventing the sale of competing goods by demanding contracts for exclusive dealing; (m) bribery of employees; (n) competing with purchaser after the sale of business and good will; (o) passing off the goods of one manufacturer or dealer as those of another. (*Trust Laws and Unfair Competition*, issued by the Bureau of Corporations, Department of Commerce, March 15, 1915, p. 334.)

In comment upon the foregoing it should be stated that the *unfair competition* cases almost wholly concern the rights of competing traders as between themselves, rather than the rights of a trader as against the public. Only where the cases involved a restraint of trade or some form of fraud on the public, has the policy of preventing unfair competitive methods because of their effect on the public been considered by the courts. (*Id.*)

But, whatever may be the practices which are embraced within the term "unfair competition," as defined at common law, it is certain that that term has never been understood or held to include the mere assertion by a private manufacturer or merchant, exercising his own independent discretion without any such wrongful or unlawful purpose, of the right of freedom to trade, which right is fundamental, uniformly upheld and fully protected under the common law. There is no principle of the common law which would justify such a charge. Neither is there any case which may be cited as authority for it.

(b) And, as hereinbefore established, the Sherman Act and the supplemental Trade Commission and Clayton Acts were all enacted for the great purpose of preserving the fundamental right of freedom to trade existing under

the common law and of protecting that right from the evil economic forces of undue restraint of trade, attempted monopoly, monopoly, and unfair methods of competition, which seek to, and would otherwise, destroy it.

> "Indeed, the necessity for not departing in this case from the standard of the rule of reason which is universal in its application is so plainly required in order to give effect to the remedial purposes which the act (i. e., the Sherman Act) under consideration contemplates, and to prevent that act from destroying all liberty of contract and all substantial right to trade, and thus causing the act to be at war with itself by annihilating *the fundamental right of freedom to trade which, on the very face of the act, it was enacted to preserve,* is illustrated by the record before us." (*United States* v. *American Tobacco Company,* 221 U. S. 106, 180.) (Italics ours.)
>
> "The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce—*in a word, to preserve the right of freedom to trade.*" (*United States* v. *Colgate & Co.,* 250 U. S. 300, 307.) (Italics ours.)
>
> "*The act (i. e., the Federal Trade Commission Act) was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade.* * * * *If real competition is to continue, the right of the individual to exercise reasonable discretion in respect of his own business methods must be preserved.*" (*Federal Trade Commission* v. *Gratz et al.,* 253 U. S. 421, 427, 428, 429.) (Italics ours.)

The antitrust laws compose the *Constitution of Freedom of American Business.* The Sherman Act commands business to compete and compels free competition. The Trade Commission Act (Section 5) commands business

to compete fairly and compels that fair competition without which there cannot be free competition. The Sherman Act protects the right of freedom to trade from undue restraint of trade, attempted monopoly and monopoly. The Trade Commission Act (Section 5) protects that right from those unfair methods of competition which constitute the means whereby undue restraint of trade and monopoly are created and maintained. The Clayton Act prohibits certain trade practices where their effect may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

(c) We are thus brought to a brief consideration of the language and effect of Section 5, reasonably construed. That section provides that "unfair methods of competition in commerce are hereby declared unlawful," and empowers and directs the Commission to prevent their use. That is, the Commission is directed to act, whenever it shall have reason to believe that any person, etc., has been or is using any unfair method of competition in commerce and if it shall appear to the Commission that a proceeding by it in respect thereof "would be to the interest of the public." Thus, Section 5 outlaws, not competition (since it was enacted more effectually to preserve competition), not unfair competition (since that was already unlawful at common law), but *unfair methods* of competition. That is, Section 5 outlaws any *method* of competition used in interstate commerce which may be reasonably held to be legally unfair as to competitors and detrimental to the public (as distinguished from a purely private) interest, either inherently, or by reason of the purpose or circumstances, or both, of its use. And Section 5 clearly and unmistakably declares the purpose of Congress to prevent the use of those *methods* of competition, primarily, which are unquestionably legally unfair as to competitors and detrimental to

the public interest, because they involve a real and dangerous tendency to suppress competition and to introduce undue restraint of trade and monopoly,—in a word, to compel that fair competition without which there cannot be free competition.

Hence, it is manifest upon the very face of Section 5, construed in harmony with its plain language and import and in the light of reason, practical common sense and the public policy it embodies, in order to effect its great remedial purpose more completely and securely to preserve and safeguard the fundamental right of freedom to trade and compete, existing at common law, and to eliminate the evils at which it is directed, that, whatever may be the competitive practices which do constitute "unfair methods of competition," within the meaning of said section,—and the final determination of the meaning and application of these words, as a matter of law, rests with this Court,—that section *does not* outlaw, and *cannot* be reasonably construed to outlaw, the mere independent assertion of such fundamental right, in the absence of any unlawful purpose. It is too plain for argument that Section 5 cannot be reasonably construed to invalidate the mere independent exercise, without any unlawful purpose, of the very right it was enacted more effectually to preserve, the preservation of which right is required in the public interest. And, as previously stated, competitors have no reasonable ground for complaint because of a loss of custom due alone to mere competition, to the lawful exercise by another of his equal right to trade and compete.

> "The words 'unfair methods of competition' are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as matter of law what they include. *They are clearly inapplicable to practices never heretofore regarded as*

*opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. The act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade. * * * If real competition is to continue, the right of the individual to exercise reasonable discretion in respect of his own business methods must be preserved. United States* v. *Colgate & Co.*, 250 U. S. 300; *United States* v. *A. Schrader's Son, Inc.*, 252 U. S. 85." (*Federal Trade Commission* v. *Gratz et al., supra*, pp. 427, 428, 429.) (Italics ours.)

Further, prior to the enactment of the Federal Trade Commission Act, this Court, in referring to the various competitive methods used to restrain and monopolize interstate commerce in violation of the Sherman Act, definitely recognized the fact that the term "unfair methods of competition" does not embrace the mere independent exertion by a private manufacturer of the ordinary right of freedom to trade, without any purpose to create or maintain a monopoly. Rather, it was expressly held to include such unfair practices against competitors as local price cutting, espionage of the business of competitors, operation of bogus independent companies, payment of rebates, limiting of sales territory of competitive subsidiary corporations, etc., all devised and designed to suppress competition and, by driving competitors out of business, to monopolize interstate trade in the products affected.

> "Indeed, the history of the combination is so replete with the doing of acts which it was the obvious purpose of the statute (i. e., the Sherman Act) to forbid, so demonstrative of the existence from the beginning of a purpose to acquire dominion and control of the tobacco trade, *not by the mere exertion of the ordinary right to con-*

tract and to trade, but by methods devised in order to monopolize the trade by driving competitors out of business, which were ruthlessly carried out upon the assumption that to work upon the fears or play upon the cupidity of competitors would make success possible." (*United States* v. *American Tobacco Co.,* 221 U. S. 106, 181-182.) (Italics ours.)

"Reiterating in substance the averments that both the Standard Oil Trust * * * and the Standard Oil Company of New Jersey * * * had monopolized and restrained interstate commerce in petroleum and its products, the bill at great length additionally set forth various means by which * * * in addition to the effect occasioned by the combination of alleged previously independent concerns, the monopoly and restraint complained of was continued. * * * such averments may properly be grouped under the following heads: * * * unfair practices against competing pipe lines; * * * *unfair methods of competition, such as local price cutting, at the points where necessary to suppress competition; espionage of the business of competitors, the operation of bogus independent companies, and payment of rebates on oil, with the like intent; the division of the United States into districts and the limiting of the operations of the various subsidiary corporations as to such districts so that competition in the sale of petroleum products between such corporations had been entirely eliminated and destroyed;" etc.* (*Standard Oil Co.* v. *United States,* 221 U. S. 1, 42-43.) (Italics ours.)

Having in mind the conception of "unfair competition" hitherto prevailing at common law and, also, the meaning judicially ascribed to the term "unfair methods of competition," and other terms of much the same general character, [1] prior to the enactment of the Federal

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"(1) In Trust Laws and Unfair Competition, ante, it is stated (pp. 333-334):

"While the primary question to be determined in the cases pre-

Trade Commission Act, and "guided by the principle that where words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense unless the context compels to the contrary" (*Standard Oil Co.* v. *United States, supra,* p. 59, and cases cited), it must be concluded that the words "unfair methods of competition," as employed in Section 5, do not embrace the mere independent exercise by a private manufacturer or trader of his common law right freely to sell or not, as he pleases, to whom he pleases, in the absence of any unlawful purpose.

(d) Moreover, Section 11 of the Federal Trade Commission Act expressly provides and positively directs, in effect, that Section 5 thereof shall not be construed to impair or destroy the fundamental right of freedom to trade existing at common law and preserved by the Sherman Act. Section 11 provides, in part, as follows:

> "* * * *nor shall anything contained in the Act be construed to alter, modify or repeal the said Anti-trust Acts* * * *or any part or parts thereof.*"

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sented here (i. e., the *unfair competition* cases arising under the common law) is the legality of the acts or conduct complained of, there is involved in many cases an element of unfairness, of breach of trust, of wilful misrepresentation, of flagrant dishonesty, or of coercion or oppression. This fact appears to have led the courts to characterize certain acts as unfair competition. The use of marks or wrappings to deceive purchasers and pass off one man's goods as those of another has for years in this country been termed unfair competition. Other practices, such as procuring the breach of a competitor's contracts, betraying, or inducing others to betray, a competitor's trade secrets, or intimidating a competitors's customers by threats of infringement suits, have also been characterized by the courts as unfair competition. These and many other acts or practices have been frequently described or alluded to by the courts in other terms of much the same significance, such as 'inequitable competition,' 'unfair conduct,' 'unfair dealing,' 'unfair means,' unfair business methods,' 'unfair advantage,' 'unfair mode of trading,' or as 'unfair and unjust practices and methods.' Such expressions also as not 'fair competition,' not 'proper competition,' not 'honest competition,' not 'legitimate competition,' not 'lawful competition,' not 'legitimate and lawful competitive methods' are frequently employed by the courts to describe competitive acts or practices which are regarded as unlawful."

Section 4 defines the term "antitrust acts" to include "the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' approved July second, eighteen hundred and ninety," i. e., the Sherman Act.

Thus, Congress has expressly and positively directed, in effect, that—

> *Section 5 shall not be construed by either the Commission or Courts to alter, modify or repeal the law of the land established by the Sherman Act as finally interpreted by this Court.*

What is the law of the land established by the Sherman Act as finally interpreted by this Court? It is this and nothing other than this: *The fundamental right of freedom to trade, existing at common law.* What is the conduct here under consideration and in issue? It is this and nothing other than this: *The lawful exercise of such fundamental right.* Hence, Section 5 cannot be construed to invalidate that conduct.

Both the plain language of the statute and the history of its enactment establish that the purpose of Congress in so limiting the application and enforcement of Section 5 was two-fold. Congress intended to make certain, beforehand, that Section 5 should not be construed either (a) to restrict or destroy the fundamental right of freedom to trade, existing at common law, which the Sherman Act was enacted to preserve, or (b) to qualify or void the broad prohibition against restraint of trade and monopoly contained in the Sherman Act or to interfere in any way with the enforcement of that act. Fear was expressed by several Senators, during the debate upon the Trade Commission bill, that Section 5 might be construed and used to emasculate and defeat the object, principle and enforcement of the Sherman Act, that that section might be used "as a brake, as a protector, as a backfire

for these monopolies, against the enforcement of the antitrust law," as one Senator bluntly put it. Congress was determined, therefore, that a statute designed by it more effectually to preserve and safeguard the fundamental right of freedom to trade, existing at common law, should not, by any possibility, be construed or used to impair or destroy such right.

The authority of the Federal Trade Commission cannot transcend the statute creating it and defining its powers and duties. The Commission cannot reasonably be held to be empowered by the statute to prohibit the proper exercise of the very right it was created to sustain, arbitrarily to substitute its will in place of the law of the land. It is the sole function of the Commission, as of the Courts, to enforce the statute according to its plain direction. This is a government of laws, not of men.

In short, to construe Section 5 as impairing or destroying the right it was enacted more completely and effectually to preserve and protect, as enslaving rather than freeing business, is nothing less than a gross misconception and misapplication of it. The right of freedom to trade cannot be preserved and protected by fettering or destroying it, by outlawing its proper exercise. Section 5 must be interpreted in the light of reason, practical common sense and the public policy it embodies, to effect its great remedial purpose and to eliminate the evils against which it is directed. There is always the duty to interpret that section—the duty arising from the general character of the language employed—so that the words "unfair methods of competition" shall be given a meaning which will not destroy the individual right of freedom to trade.

We ask: What standard or principle of statutory construction authorizes and justifies the construction of Sec-

tion 5 to impair or destroy the very right it was enacted more completely and effectually to preserve and protect? What standard or principle of statutory construction authorizes and justifies a construction of Section 5 that is subversive of its fundamental purpose, does violence to its plain language and import, is directly opposed to and forbidden by the positive definitive declaration contained in Section 11, and is repugnant to reason and common sense? In construing Section 5 so as to effect the great remedial purpose which it contemplates, it is not to be caused to be at war with itself by annihilating the fundamental right of freedom to trade which, on the very face of that section, it was enacted to preserve. (See *United States* v. *American Tobacco Co.*, 221 U. S. 106, 180.)

5. *Finally, the principle is now incontrovertible, as a result of the decisions of this Court in the recent cases of United States v. Colgate & Co.*, 250 *U. S.* 300, *United States v. A. Schrader's Son, Inc.*, 252 *U. S.* 85, *and Federal Trade Commission v. Gratz et al.*, 253 *U. S.* 421, *respectively, that, in the absence of any such unlawful purpose, Section* 5 *does not restrict "the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal" (Colgate case, p.* 307) *and "to exercise reasonable discretion in respect of his own business methods" (Gratz case, pp.* 428-429). *"And, of course, he may announce in advance the circumstances under which he will refuse to sell." (Colgate case, p.* 307.) In so exercising his discretion as to whom he will sell, the trader or manufacturer is but lawfully asserting the fundamental right of freedom to trade, existing at common law, which right, as stated, the Sherman Act and the supplemental Trade Commission and Clayton Acts were all enacted to preserve and protect, and do not impair or destroy.

"The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce—*in a word, to preserve the right of freedom to trade.*" (*United States* v. *Colgate & Co., supra,* p. 307.) (Italics ours.)

"The words 'unfair methods of competition' are not defined by the statute (i. e., the Federal Trade Commission Act) and their exact meaning is in dispute. It is for the courts, not the commissmission, ultimately to determine as matter of law what they include. *They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. The act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade.* * *

"*All question of monopoly or combination being out of the way, a private merchant, acting with entire good faith, may properly refuse to sell except in conjunction, such closely associated articles as ties and bagging. If real competition is to continue, the right of the individual to exercise reasonable discretion in respect of his own business methods must be preserved. United States* v. *Colgate & Co.*, 250 U. S. 300; *United States* v. *A. Schrader's Son, Inc.*, 252 U. S. 85." (*Federal Trade Commission* v. *Gratz et al., supra,* pp. 427, 428, 429.) (Italics ours.)

The *Gratz* case, of particular interest and importance by reason of the fact that it is the first case decided by this Court arising under Section 5 of the Federal Trade Commission Act, is precisely in point and conclusively establishes the proposition here under consideration. In that case the Court affirmed the judgment of the Circuit Court of Appeals for the Second Circuit setting

aside an order to cease and desist made by the Commission under the alleged authority of Section 5, upon the ground that—

> "The first count of the complaint fails to show any unfair method of competition practiced by respondents and the order based thereon was improvident." (*Id.*, p. 429.)

Mr. Justice McReynolds, speaking for the Court, said:

> "It is unnecessary now to discuss conflicting views concerning validity and meaning of the act creating the commission and effect of the evidence presented. The judgment below must be affirmed since, in our opinion, the first count of the complaint is wholly insufficient to charge respondents with practicing 'unfair methods of competition in commerce' within the fair intendment of these words. We go no further and confine this opinion to the point specified.
>
> "When proceeding under §5, it is essential, *first*, that having reason to believe a person, partnership or corporation has used an unfair method of competition in commerce, the commission shall conclude a proceeding 'in respect thereof would be to the interest of the public'; *next*, that it formulate and serve a complaint stating the charges 'in that respect' and give opportunity to the accused to show why an order should not issue directing him to 'cease and desist from the violation of the law so charged in said complaint.' If after a hearing the commission shall deem 'the method of competition in question is prohibited by this Act,' it shall issue an order requiring the accused 'to cease and desist from using such method of competition.'
>
> "If, when literally construed, the complaint is plainly insufficient to show unfair competition within the proper meaning of these words there is no foundation for an order to desist—the thing which may be prohibited is the method of competition specified in the complaint. Such an order

should follow the complaint; otherwise, it is improvident and, when challenged, will be annulled by the court." (*Id.*, pp. 426-427.)

Undertaking to proceed under Section 5 of the act, the Commission issued a complaint, containing two counts, against respondents. The first count charged a violation of Section 5 of the Federal Trade Commission Act, whereas the second count charged a violation of Section 3 of the Clayton Act. Respondents denied both charges. After taking much testimony the Commission held that there was no evidence to support the second count, but ruled that respondents had used unfair methods of competition in interstate commerce in violation of Section 5 and ordered that they, "their officers and agents, cease and desist from requiring purchasers of cotton ties to also buy or agree to buy, a proportionate amount of American Manufacturing Company's bagging and further that the respondents cease and desist from refusing to sell cotton ties unless the purchasers buy or agree to buy from them corresponding amounts of American Manufacturing Company's bagging, or any amount of cotton bagging of any kind." (*Id.*, p. 424.) This order, duly challenged by the respondents, was based solely upon the first count of the complaint, the allegations of which were summarized by this Court thus:

> "Count one alleges, in effect, that Warren, Jones & Gratz are engaged in selling, either directly to the trade or through their correspondents, cotton ties produced by the Carnegie Steel Company and also jute bagging manufactured by the American Manufacturing Company. That P. P. Williams & Company of Vicksburg, and Charles O. Elmer of New Orleans, are the selling and distributing agents of Warren, Jones & Gratz, and as such sell and distribute their ties and bagging to jobbers and dealers who resell them to retailers, ginners and farmers. That with the purpose and

effect of discouraging and stifling competition in the sale of said bagging *all the respondents for more than a year have refused to sell any of such ties unless the purchasers would buy from them a corresponding amount of bagging—six yards with as many ties.*" (*Id.*, p. 428.) (Italics ours.)

After pointing out that

"The complaint contains no intimation that Warren, Jones & Gratz did not properly obtain their ties and bagging as merchants usually do; the amount controlled by them is not stated; nor is it alleged that they held a monopoly of either ties or bagging or had ability, purpose or intent to acquire one. So far as appears, acting independently, they undertook to sell their lawfully acquired property in the ordinary course, without deception, misrepresentation or oppression, and at fair prices, to purchasers willing to take it upon terms openly announced.

"Nothing is alleged which would justify the conclusion that the public suffered injury or that competitors had reasonable ground for complaint." (*Id.*, p. 428.)

this Court concluded:

"*All question of monopoly or combination being out of the way, a private merchant, acting with entire good faith, may properly refuse to sell except in conjunction, such closely associated articles as ties and bagging. If real competition is to continue, the right of the individual to exercise reasonable discretion in respect of his own business methods must be preserved. United States* v. *Colgate & Co.*, 250 U. S. 300; *United States* v. *A. Schrader's Son, Inc.*, 252 U. S. 85." (*Id.*, pp. 428-429.) (Italics ours.)

6. *Thus, it is clear and indisputable upon the very face of Section* 5, *reasonably construed, and likewise upon*

both principle and authority, that, in the absence of any such unlawful purpose, that section does not restrict the common law right of a manufacturer, engaged in an entirely private business and exercising his own independent discretion in the normal course of his own individual trade, freely to refuse to sell his own lawfully possessed property (legitimate articles of commerce), for any reason satisfactory to him or for no reason at all, and to announce in advance the circumstances under which he will refuse to sell. His freedom of discretion in this respect is complete. Consequently, Section 5 does not restrict the right of such manufacturer so to refuse to sell to dealers for the particular reason that they are, in his honest judgment, undesirable customers, undesirable because they either do not charge the prices suggested by him or resell to other dealers who do not charge such prices, prices which are, in his estimation made in entire good faith, fair and reasonable in all respects, essential to the welfare and prosperity of his own business, and in the interest of the trade and public, generally, who, however, when he does sell, imposes no restraint whatever upon the right of future alienation, by restrictive agreements (express or implied). Each buyer receives, upon each sale, a full and unqualified title to the property so bought and owned by him, possesses unrestricted liberty of alienation with respect thereto, and is entirely free to resell it as he pleases, to whom he pleases, at any price he pleases. And, even if it be assumed that the manufacturer is mistaken in his estimate of the character of the prices so suggested by him, that they are, either partially or wholly, other than fair and reasonable, his right of refusal, exercised under the circumstances defined, remains unimpaired. That right is obviously independent of the character of the prices suggested. It is not impaired or destroyed merely because poor judgment

is used in its exercise. Such refusal-to-sell-conduct can no more be condemned under the Trade Commission Act solely because the prices so suggested are unreasonable than resale-price-fixing contracts can be saved under the Sherman Act solely because the prices thereby fixed, maintained and enforced are reasonable. Such refusal-to-sell conduct is lawful under both the Sherman and Trade Commission Acts because it involves, not the imposition of a restraint upon the fundamental common law right of freedom to trade by restrictive agreements, with respect to movables sold, which right both acts were enacted to preserve and protect, but, on the contrary, the mere independent assertion of that right by a private manufacturer, without any unlawful purpose, with respect to movables owned. Such resale-price-fixing contracts are unlawful under both the Sherman and Trade Commission Acts because they involve, not the mere independent assertion of the fundamental common law right of freedom to trade by a private manufacturer, without any unlawful purpose, with respect to movables owned, which right said acts neither restrict nor destroy, but, on the contrary, the imposition of a restraint upon that right, with respect to movables sold.

The fact is, as we all know, that dealers must always satisfy their manufacturers or they must go without goods. Whether they shall be able to buy must always depend upon the manufacturer's judgment and decision, in the absence of a contract creating an obligation to sell. The freedom to which dealers are entitled is precisely that to which manufacturers are entitled, and no more, viz., the freedom to sell the property they own. The freedom of neither the manufacturer nor the dealer extends so as to control the sale of property owned by another, in the absence of any contractual obligation to sell. To construe Section 5 as requiring the manufacturer to sell

against his will to a dealer who proposes to buy, in the absence of a contract obligating the manufacturer to sell, would be to project the will of the dealer so as to cause it to control property not subject to his will because owned by another, and thus to make the will of such dealer unwarrantedly take the place of the law of the land as to such property.

III.

AND IF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT MAY BE CONSTRUED AND IS APPLIED TO DEPRIVE A MANUFACTURER OR TRADER, ENGAGED IN AN ENTIRELY PRIVATE BUSINESS AND EXERCISING HIS OWN INDEPENDENT DISCRETION IN THE NORMAL COURSE OF HIS OWN INDIVIDUAL TRADE WITHOUT ANY SUCH UNLAWFUL PURPOSE, OF HIS FUNDAMENTAL RIGHT OF FREEDOM TO TRADE, EXISTING AT COMMON LAW, TO-WIT, THE RIGHT FREELY TO SELL HIS OWN LAWFULLY POSSESSED PROPERTY (LEGITIMATE ARTICLES OF COMMERCE) OR NOT, AS HE PLEASES, FOR ANY REASON HE PLEASES, TO WHOM HE PLEASES, AND THUS, IN EFFECT, TO COMPEL HIM, AGAINST HIS WILL, TO SELL HIS OWN PRIVATE PROPERTY TO OTHERS, TO WHOM HE IS UNDER NO CONTRACTUAL OR OTHER OBLIGATION TO SELL, FOR THEIR PRIVATE USE AND BENEFIT, THEN THAT SECTION MUST BE HELD TO VIOLATE THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND TO BE VOID, BECAUSE IT THEREBY DE RIVES SUCH MANUFACTURER OR TRADER OF HIS LIBERTY AND PROPERTY WITHOUT DUE PROCESS OF LAW.

1. *The Fifth Amendment to the Constitution of the United States in providing that—*

> "* * * nor (shall any person) be deprived of life, liberty, or property, without due process of law; * * *"

but declares, confirms and sanctifies the great and ancient principles of the common law as to the fundamental rights of the individual, and secures them from invasion by the power of the federal government.

"Article 5 of the amendments to the constitu-

tion of the United States only announces and reaffirms the ancient principles of the common law, and prevents them from being unjustly invaded by the power of the federal government." (*North Carolina* v. *Vanderford*, 35 Fed., 282, 283.)

As Judge Cooley said in *Weimer* v. *Bunbury*, 30 Mich. 201:

> "The truth is, the bills of rights in the American constitutions have not been drafted for the introduction of new law, but to secure old principles against abrogation or violation. They are conservatory instruments rather than reformatory; and they assume that the existing principles of the common law are ample for the protection of individual rights, when once incorporated in the fundamental law, and thus secured against violation." (Id., p. 214.)

2. *One of the great and ancient principles of the common law is the fundamental right of freedom to trade, subject only to the limitations necessarily arising out of the recognition of the equal right of others and the paramount interest of the common good and general public welfare.* As we have already seen, under the common law a manufacturer or trader, engaged in an entirely private business and exercising his own independent discretion without any unlawful purpose, has always had the unquestioned right freely to sell his own lawfully acquired and possessed property (legitimate articles of commerce) or not, as he pleases, for any reason he pleases, to whom he pleases.

3. *Consequently, it must be concluded that if Section 5 may be construed and is applied to deprive such a manufacturer or trader of his fundamental common law right of freedom to trade, when exerted under the circumstances defined, to-wit, the right freely to sell his own lawfully possessed property (legitimate articles of com-*

merce) or not, as he pleases, for any reason he pleases, to whom he pleases, and thus, in effect, to compel him, against his will, to sell his own private property to others, to whom he is under no contractual obligation to sell, for their private use and benefit, that section is a clear invasion of the personal liberty, as well as the right of property, guaranteed and secured by the Fifth Amendment. It is no more a proper and valid function of the government to compel a private manufacturer or trader, against his will, so to sell his own private property for the private use and benefit of another, to whom he is under no contractual obligation whatever to sell, than it is a proper and valid function of the government either to compel any person in the course of his own private business and against his will to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another, in the absence of a contract between the respective parties. The general principle is well illustrated by the leading *Adair* case (208 U. S., 161). In that case this Court, in the course of a discussion upon the due process clause in the Fifth Amendment, said:

> "Mr. Cooley, in his treatise on Torts, p. 278, well says: 'It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice or malice. With his reasons neither the public nor third persons have any legal concern. * * *'
>
> "While, as already suggested, the rights of liberty and property guaranteed by the Constitution against deprivation without due process of law, is subject to such reasonable restraints as the common good or the general welfare may require, it is not within the functions of government—at least in the absence of contract between the parties—to compel any person in the course of his busi-

ness and against his will to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another. The right of a person to sell his labor upon such terms as he deems proper, is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions under which he will accept such labor from the person offering to sell it. So the right of the employe to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employe." (Id., pp. 173, 174-175.)

Other pertinent expressions are these:

"The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned." (*Allgeyer* v. *Louisiana*, 165 U. S., 578, 589.)

"That any one of the persons engaged in the retail lumber business might have made a fixed rule of conduct not to buy his stock from a producer or wholesaler who should sell to consumers in competition with himself, is plain. No law which would infringe his freedom of contract in that particular would stand." (*Grenada Lumber Co.* v. *Mississippi*, 217 U. S., 433, 440.)

Further:

"The taking by a State of the private property of one person or corporation, without the owner's

consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States." (*Missouri Pacific Railway* v. *Nebraska,* 164 U. S., 403, 417, and cases cited.)

"But there is no rule or principle known to our system under which private property can be taken from one person and transferred to another, for the private use and benefit of such other person, whether by general law or by special enactment. The purpose must be public, and must have reference to the needs or convenience of the public, and no reason of general public policy will be sufficient to validate other transfers when they concern existing vested rights." (*Cooley, Constitutional Limitations,* Ed. 7, pp. 507-508.)

"Numerous individuals and corporations have been enjoined from restraining the trade of other people, no matter how flourishing the offenders' trade might be, nor how generally the general volume of trade had increased during the period of restraint. But never before has it been urged that, if J. S. made enough of anything to supply both Doe and Roe, and sold it all to Doe, refusing even to bargain with Roe, for any reason or no reason, such conduct gave Roe a cause of action. If Congress has sought to give him one, the gift is invalid, because the statute takes from one person for the private use of another the first person's private property. * * * If a man prefers to keep what he has, an offer of money to salve the the taking thereof does not prevent such taking from being confiscation. The Cream of Wheat Company is a purely private concern, except as regulated by its creating law. It is an ordinary merchant, whose business is affected by no public use whatever. The statute as construed by plaintiff descends upon that private merchant, and commands him to make a contract by which he transfers his property for a price, but against his will. The contract and the price are legally mere surplusage; the constitutional violation lies in the

compulsion whereby he is deprived of his property for a private purpose. * * * but neither the nation nor any individual can take away its property, with or without compensation, for the private use of anyone." (Judge Hough, *Great Atlantic & Pacific Tea Company* v. *Cream of Wheat Company* (D. C.), 224 Fed., 566, 574-575.)

"Every man controls his own property as he pleases, puts it to such use as he pleases, improves it or not as he may choose, subject only to the obligation to perform, in respect to it, the duties he owes to the State, and to his fellows. *The State cannot substitute its judgment for his as to the use he should make of it for his own advantage.*" (*Cooley on Torts*, Vol. 2, p. 614.) (Italics ours.)

IV.

HENCE, SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT DOES NOT DEPRIVE THE BEECH-NUT PACKING COMPANY, ENGAGED IN AN ENTIRELY PRIVATE MANUFACTURING BUSINESS AND ALWAYS EXERCISING ITS OWN INDEPENDENT DISCRETION IN THE NORMAL COURSE OF ITS OWN INDIVIDUAL TRADE WITHOUT ANY SUCH UNLAWFUL PURPOSE, OF THE FUNDAMENTAL RIGHT OF FREEDOM TO TRADE, EXISTING AT COMMON LAW, TO-WIT, THE RIGHT FREELY TO SELL ITS OWN LAWFULLY POSSESSED PROPERTY (UNQUESTIONABLY LEGITIMATE ARTICLES OF COMMERCE) OR NOT, AS IT PLEASES, FOR ANY REASON IT PLEASES, TO WHOM IT PLEASES, AND TO ANNOUNCE IN ADVANCE THE CIRCUMSTANCES UNDER WHICH IT WILL REFUSE TO SELL, WHICH COMPANY, HOWEVER, WHEN IT DOES SELL, IMPOSES NO RESTRAINT WHATEVER UPON THE RIGHT OF FREEDOM OF ALIENATION OF BUYERS FROM IT, BY RESTRICTIVE AGREEMENTS (EXPRESS OR IMPLIED). AND SECTION 5, IF CONSTRUED AND APPLIED TO DEPRIVE THE BEECH-NUT PACKING COMPANY OF SUCH FUNDAMENTAL RIGHT AND THUS, IN EFFECT, TO COMPEL IT, AGAINST ITS WILL, TO SELL ITS OWN PRIVATE PROPERTY TO OTHERS, TO WHOM IT IS UNDER NO CONTRACTUAL OR OTHER OBLIGATION TO SELL, FOR THEIR PRIVATE USE AND BENEFIT, MUST BE HELD TO BE REPUGNANT TO THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND VOID, BECAUSE IT THEREBY DEPRIVES THE COMPANY OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW.

1. *It is clear upon the face of the record that the conduct here challenged and in issue is, in essence, simply and precisely this: the refusal by the Beech-Nut Packing Company, engaged in an entirely private manufacturing*

business, to sell its own lawfully possessed property (unquestionalbly legitimate articles of commerce) to dealers for the reason that they are, in its honest judgment, undesirable customers, undesirable because they either do not charge the prices suggested by it or resell to other dealers who do not charge such prices, prices which are, in its estimation made in good faith, fair and reasonable in all respects, essential to the welfare and prosperity of its own business, and in the best interest of the trade and consuming public generally. The Company effects such refusals solely in pursuance of its own discretion independently exercised, exclusively in the normal course of its own individual trade, and always without any unlawful purpose (i. e., a purpose either opposed to good morals because characterized by fraud, deception, misrepresentation, bad faith, intimidation, oppression, or some other wrongful element, or against public policy because involving undue restraint of trade or monopoly, actual or potential, or the doing of any act otherwise prohibited by law). Its only purpose in so refusing to sell is this: to protect its own private business from the serious injury which results from the charging of prices which are either unreasonably high or unfairly low, during the course of distribution, for the products which carry its good name and bear its well and favorably known trade-mark, which prices are likewise detrimental to the best interests of the trade and consuming public. When the Company does sell, however, it imposes no restraint whatever upon the right of freedom of alienation of bu ers from it, no limitation upon the future price and buyers, by restrictive agreements, whether express or implied. Each buyer from the Company receives, upon each sale, a full and unqualified title to the property so bought and owned by him, possesses complete and unrestricted liberty of alienation with respect thereto, and is wholly free to resell it as he pleases, to whom he pleases,

at any price he pleases. All that he cannot do, insofar as the Company is concerned, is to buy from the Company unless it chooses to sell. And that is all there is of it. There is no unlawful agreement or combination or conspiracy in restraint of trade, there is no monopoly, actual or attempted, there is no unlawful purpose. There is only the independent refusal by a private manufacturer to sell his own lawfully possessed property, without any unlawful purpose. Sales actually made are unconditional and absolute.

2. *It is indisputable that, in so refusing to sell, the Beech-Nut Packing Company is but lawfully exercising the fundamental right of freedom to trade, existing at common law, which Section 5 of the Federal Trade Commission Act was expressly enacted more completely and effectually to preserve and safeguard, and does not impair or destroy.*

Public policy manifestly supports the refusal by a private manufacturer to sell his own lawfully possessed property under the circumstances defined, because such refusal, as stated, merely involves the lawful assertion of a fundamental right which it is the public policy, expressed and enforced by the anti-trust laws, to preserve and protect. Moreover, sound public policy supports and justifies such refusal by a maunfacturer to sell to dealers who, in his honest judgment, charge unfair prices, because such refusal is a reasonable exercise of the right of freedom to trade. The fact that the manufacturer may be honestly mistaken in his judgment neither derogates from the entire legality of his conduct nor renders it any the less reasonable. Will it reasonably be said that a manufacturer is not justified in declining sales to any dealer whose merchandising practices are, in his honest judgment, detrimental to his own business, to the trade and to the consuming public at large? Will it rea-

sonably be held that he is not justified in declining sales to dealers whose stores are unsanitary, whose advertisements are fraudulent, whose prices are either excessively high or unfairly low, or whose selling methods are, in any respect, improper, inefficient or detrimental? Will it reasonably be maintained that a manufacturer has passed beyond the bounds of proper and lawful conduct in merely declining to sell, in entire good faith, to his detriment? For be it always remembered that manufacturers are in business to sell, not to refuse to sell. Their ultimate objective is to effect maximum sales, to effect maximum distribution. No manufacturer declines to sell, in the normal course of trade, except where he is convinced that to sell would be detrimental rather than beneficial. And so long as the manufacturer acts independently and without any unlawful purpose, his discretion as to whether or not he will sell is complete.

It is obvious that the interest of the manufacturer of an article definitely identified in the public mind by trademark, brand or name—such as the Beech-Nut Packing Company, the maker of the well-known Beech-Nut Brand of food products—does not cease with his own sale, with the mere formality of the transfer of title to the physical article to the buyer. He has a real, vital and continuing interest in the manner and method of the subsequent sale, disposition or use of such article during the course of distribution and until it reaches the consumer. When the manufacturer sends his identified article out into the channels of trade, its reputation and fair name are committed to the keeping and are placed at the mercy of the dealers who distribute it. And any action by such distributing dealers which reflects upon, injures or slanders the favorable reputation and fair name of such article whereby other dealers or the consumers are prejudiced against it and influenced against its further purchase, is a matter of the most serious consequence to the manufacturer.

The intangible property right of the manufacturer in his trade-mark, a right recognized and protected by law against infringement, and the good-will value represented by that trade-mark, created by years of hard, patient and expensive effort, sustained high quality of product, and uniform fair dealing, whereby articles bearing that trade-mark are widely and favorably known and generally sought and used, constitute his most precious and valuable possession, a possession far more valuable than the tangible assets of his business. The Trade Commission has fully recognized this continuing interest. Commissioner William B. Colver has said: "The Commission has recognized that the manufacturer of an identified product has a very real interest in its disposition even after it has parted legal title." (*Address delivered before the American Specialty Manufacturers' Association, at Atlantic City, November* 21, 1919.)

A dealer can do no greater injury to the reputation and fair name of such identified article than to charge a price therefor which is so unreasonably excessive as to be immoral and unlawful, as to repel buying, or is so unfairly low as to demoralize trade therein, make it unprofitable and undesirable for other dealers to handle it and influence dealers generally to drop it from stock. Fair resale prices are absolutely essential to the continued successful sale of such an article. It is not necessary to dwell upon or emphasize the injury to the manufacturer and to the consumer that follows the charging of an unreasonably excessive price for such an article by the dealer or to prove that the practice of charging such an exorbitant price repulses purchases and prejudices the consumer against the article. With respect to the detriment of unfair price cutting we need only quote the words of the Trade Commission: "The consuming public does not enjoy benefits by unfair price cutting to compensate it for the injuries following demoralization caused by

price cutting. This for the reason that in the long run, unrestrained price cutting tends to impair if not to destroy, the production and distribution of articles desirable to the public. * * * Unrestrained price cutting is not in the public interest." (*Special Report by the Federal Trade Commission to Congress re resale price maintenance,* 1919.)

As District Judge Waddill said in the *Colgate* case:

> "It cannot be said that the defendant has no interest in the prices at which its goods shall be sold. On the contrary, it had a vital interest, in so far as cutting the same would tend to demoralize the trade, and might have been more injuriously affected by the result of this disorganization than the public would be benefited by a temporary reduction in the prices of its products. The sale of the defendant's particular soaps cannot be said to be a necessity, or that the same bears a large proportion to the entire manufacture of soaps of kind and grade involved. The successful prosecution of the defendant's business, and the continued use of its soap by the public, depend upon its ability to find and maintain a market for its output. Price cutting would almost inevitably result in reducing the defendant's business in a given community to only those engaged in that practice, and deprive it of the patronage of the great body of wholesalers and retailers engaged in what they believed to be a fair and legitimate conduct of their business. It by no means follows that, in the end, the public would be benefited, as price cutter could easily raise prices after the demoralization caused by his conduct had been brought about, and profit individually by so doing. What the public is interested in is that only reasonable and fair prices shall be charged for what it buys, and it is not claimed that the defendant's manner of conducting its business has otherwise resulted." (*United States* v. *Colgate & Company* (D. C.), 253 Fed., 522, 527.)

Further, sound policy supports the *bona fide suggestion* by the manufacturer of resale prices which are, in his honest and deliberate judgment, fair and reasonable, *solely for the information and education of dealers,* in order that they may not unknowingly resell at a price which is either unreasonably high or unfairly low, *solely for the information and guidance of the consuming public,* in order that it may not unwittingly pay an exhorbitant price for the article of his manufacture, which prices are not arbitrarily named but suggested only after a most careful, thorough and intelligent investigation of all the facts involved made by an efficient and experienced organization. Of course, if dealers prefer to ignore such suggested prices and to resell the article purchased from the manufacturer and owned by them at another price, the manufacturer has nothing to say and can have nothing to say, since he imposes and can impose no restraint whatever upon the right and freedom of alienation of his buyers. The manufacturer can, however, refuse to make further sales to such dealers.

It is trite to say that a fair profit is essential to a successful and sound business, that no dealer can definitely continue in business unless he uniformly makes a living and fair profit above his total expense. The fact is that many retailers do not know their costs and thereby unknowingly sell at a price which returns no profit or entails a loss. As the Trade Commission has said: "The Federal Trade Commission has found that the majority of retail merchants do not know accurately the cost of conducting their business and for this reason they are unable to price their goods intelligently. There must be a decided improvement in this direction *before competition can be placed upon a sound basis* and before we can expect a decrease in the heavy business death rate among retail merchants." (*House Doc. No.* 1355, 64*th*

Cong., 1st Sess.) (Italics ours.) The public is vitally interested in a sound, fair and successful conduct of their business by dealers. Likewise, the manufacturer is vitally interested in the charging of fair and reasonable prices for the articles of his manufacture by dealers.

It is clear, therefore, that, in the absence of any unlawful purpose, the *mere independent suggestion* of resale prices by a manufacturer which are, in his honest judgment, fair and reasonable, and the *mere independent refusal* by the manufacturer to sell to dealers who charge prices which are, in his honest judgment, unreasonably high or unfairly low, is a reasonable conduct purposed reasonably to protect and develop his own individual and private business and to safeguard the best interests of the trade and the public generally, that such refusal is a reasonable exercise of his fundamental right of freedom to trade. There is and can be nothing unlawful about such conduct, since it merely involves the lawful exercise of the ordinary and undoubted right of freedom to trade, the assertion of the manufacturer's constitutional liberty, and there is no restraint whatever upon the right and freedom of future alienation in the case of property sold.

3. *It is manifest that the actual and practical effect of the order issued by the Commission against the Beech-Nut Packing Company, if valid and enforced, is to compel that Company, against its will, to sell its own lawfully possessed private property to others, to whom it is under no contractual or other obligation to sell, for their private use and benefit . We deny that Section 5 authorizes the Commission to issue such an order. We submit that Section 5, construed to authorize such an order and applied to enforce it, clearly contravenes the Fifth Amendment to the Constitution of the United States and is void, because it thereby deprives the Company of its property without due process of law.*

And such order is not only inherently void for want of authority and power to make it, for the reasons hereinbefore set forth, but it is also patently repugnant to reason and common sense. Even a cursory examination of its terms must lead to that conclusion. The Company is forbidden, in substance, to refuse to sell to dealers who either do not charge the prices suggested by it or resell to other dealers who do not charge such prices, whatever may be their character. Let us assume, as the order permits us to assume, that the suggested prices are fair and reasonable in all respects. What is the result? The Company cannot lawfully decline to sell to dealers who either charge other and unfair or unreasonable prices or resell to dealers who charge prices of that character. That is, the Company must, under the direct compulsion of a government order, sell to dealers who practice unfair price cutting. Yet the Commission, as we have previously seen, has officially reported to Congress that such unfair price cutting is not in the public interest, that it injuriously demoralizes trade, that, in the long run, it tends to impair, if not to destroy, the production and distribution of the articles subject to it, articles desirable to the public. Thus, under the guise of preventing the use of unfair methods of competition in order to preserve free and fair competition and to secure the fundamental right of freedom to trade, the Commission seeks to compel this private manufacturer, against its will, to sell its own lawfully possessed private property to its conceded detriment and possible ruin, to sell to the conceded detriment of the trade and consuming public, to sell to dealers who are concededly unfair traders and are concededly engaging in an unfair method of competition. Thus the Commission in effect, commands this private manufacturer to hand over its own property to commercial pirates, upon their demand and tender of the price, for their injurious and destructive abuse.

We ask: Can it reasonably be said that a manufacturer who merely suggests fair and reasonable resale prices for the consideration of dealers and announces that he will refuse to sell to all dealers who charge other and unfair and unreasonable prices, and does so refuse to sell, upon occasion, is guilty of using an unfair and unlawful method of competition because dealers, who are under no obligation whatever to resell at such suggested prices, recognizing their inherently fair and reasonable character and realizing that fair and reasonable prices are essential in the best interest of the trade, industry and public at large, voluntarily elect to use them, whereas, if such dealers elect to ignore such prices, as they have a perfect right and are entirely free to do, and to charge other and unfair and unreasonable prices, the manufacturer is then using a fair and lawful method of competition? In other words, if the conduct of the dealers is fair, then the conduct of the manufacturer becomes unfair and unlawful, whereas, if the conduct of the dealers is unfair, then the conduct of the manufacturer becomes fair and lawful. This is precisely the logic upon which this order is based, since the essential ingredient of the alleged offense is the fact that dealers do resell at the suggested prices. Can it be imagined that the Commission would have instituted this proceeding if dealers generally had ignored such prices? The fallacy of this logic is obvious. It wholly disregards the basic and controlling fact that both the manufacturer and dealers are only doing what they have a clear and undoubted right to do. The manufacturer is merely independently exercising his fundamental right of freedom to trade, without any unlawful purpose and without imposing any unlawful restraint upon the right of freedom of future alienation, by restrictive agreements (expressed or implied), in the case of sales actually made. Each dealer is likewise but independently exercising his fundamental right of freedom to trade, without any unlawful purpose.

4. *Further, if the refusal-to-sell conduct of the Beech-Nut Packing Company constitutes an "unfair method of competition" within the meaning of Section 5, then it must likewise constitute "unfair competition" under the common law. But, there is no principle of the common law which supports or justifies such a conclusion.*

In short:

There is no principle of the common law which compels the Beech-Nut Packing Company to sell against its will; neither the Trade Commission Act nor any other federal statute compels the Company to sell against its will; there is no federal statute which denies to the Company the right to refuse to sell for the particular reason stated, under the circumstances stated; there is no principle of the common law which makes the ground of its refusal a destruction of its fundamental right to refuse to sell, when independently asserted without any unlawful purpose; the Company is under no contractual obligation to sell. Hence, the Company is under no legal obligation whatever to sell. And Section 5 cannot, consistently with the due process clause of the Fifth Amendment, be construed and applied to compel the Company to sell against its will.

V.

THE THEORY UPON WHICH THE COMMISSION PREDICATES ITS CHARGE AND CONCLUSION THAT THE REFUSAL-TO-SELL POLICY OF THE BEECH-NUT PACKING COMPANY INVOLVES THE USE OF AN UNFAIR METHOD OF COMPETITION OUTLAWED BY SECTION 5, IS CONCLUSIVELY ESTABLISHED TO BE WITHOUT ANY SUPPORT OR JUSTIFICATION WHATEVER, EITHER IN FACT OR LAW, WHEN TESTED BY THE AGREED FACTS AND THE APPLICABLE AND INDISPUTABLE PRINCIPLES OF LAW.

1. *Reduced to its essentials, the theory*[1] *upon which the Commission predicates its charge and conclusion of unfair and unlawful method of competition, here, simply*

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[1] This theory will be found plainly set forth in Paragraph Three, as amended, of the Complaint (Rec., pp. 27-28), in Paragraphs Six, Fourteen, Fifteen and Sixteen of the Findings as to the Facts (id., pp. 37-38, 42-43), and in the Order to Cease and Desist (id., pp. 43-44). We again direct the attention of the Court to the fact that the Findings as to the Facts (id., pp. 36-43) embody a verbatim copy of the Agreed Statement of Facts (id., pp. 29-35), with these exceptions, to-wit: (a) the circular letter set out in Paragraph 5 of the Agreed Statement (id., pp. 30-31) is omitted from the similar Paragraph Five of the Findings (id., p. 37), an immaterial variation; (b) Paragraphs Six, Fourteen, Fifteen and Sixteen of the Findings (*supra*), *are entirely new, are not incorporated in or reproduced from the Agreed Statement.* The latter four paragraphs purport to define the alleged unlawful purpose and effect of the conduct in issue. It is manifest, however, that the alleged "findings as to the facts" contained in these paragraphs are not supported by the Agreed Statement, in their essential allegations, but, indeed, are directly contradicted by the remaining findings which are supported by the Agreed Statement. These paragraphs have been arbitrarily inserted into the Findings. They do not contain true findings as to the facts, at all, in the proper meaning of that term. They are essentially composed of matters of argument and set forth inferences and conclusions of fact and law which are without any support or justification whatever. They incorporate a specious argument built out of pure assumption and based upon a gross misinterpretation of Section 5 and a misapplication of settled principles of law. We again direct the attention of the Court to the fact that Section 5 specifically provides that the findings of the Commission as to the facts shall only be conclusive, in such a proceeding as this, if supported by testimony (here by the Agreed Statement). Hence, the alleged findings as to the facts contained in said paragraphs are not conclusive in this proceeding.

amounts to this, in effect: The Company's refusal-to-sell policy is an unfair and unlawful method of competition within the meaning of Section 5, because (a) *it is detrimental to the public, for the reason that it involves the imposition by the Company of an actual restraint upon the right of freedom of alienation of buyers from it, whereby they are deprived of their fundamental right freely to sell the property bought from the Company and owned by them at any price they please and to whom they please, are compelled to resell at prices fixed, maintained and enforced by the Company, and are prevented from reselling either at lower prices or to dealers who resell at lower prices, wherefore price competition in the resale of Beech-Nut products is completely suppressed and destroyed;* (b) *it is detrimental to competing manufacturers, for the reason that dealers, generally, prefer to buy and sell and prefer to push the sale of Beech-Nut products, because of the Company's said merchandising policy, rather than the similar products of other and competing manufacturers who do not effect such a policy.*

2. *But, such charge and conclusion that the Company's refusal-to sell policy is an unfair and unlawful method of competition within the meaning of Section 5, because it is detrimental to the public, for the reason that it involves the imposition by the Company of an actual restraint upon the right of freedom of alienation of buyers from it, whereby they are deprived of their fundamental right freely to sell the property bought from the Company and owned by them at any price they please and to whom they please, are compelled to resell at prices fixed, maintained and enforced by the Company, and are prevented from reselling either at lower prices or to dealers who resell at lower prices, wherefore price competition in the resale of Beech-Nut products is completely suppressed and destroyed, are conclusively established to*

be wholly unfounded because it is expressly and explicitly declared in Paragraph 12 of the Agreed Statement of Facts (Rec., p. 35) *and in Paragraph Seventeen of the Findings as to the Facts* (Rec., p. 43) *that "the merchandising conduct of respondent, heretofore defined and as herein involved, does not constitute a contract or contracts whereby resale prices are fixed, maintained and enforced," because there is neither charge nor finding that the Company restricts the right of dealers freely to sell to whom they please, by contract or agreement.* Further, the attention of the Court is again directed to the significant and decisive fact that the Complaint, as originally drawn, charged that the Company requires its purchasers *to agree* to maintain standard resale prices fixed by it and refuses to sell to dealers who will not so *agree.* (Rec., p. 25.) Subsequently, however, the Complaint was amended, upon the motion of the Commission, and this charge was entirely withdrawn, since concededly the Company effects no such agreements. (Rec., pp. 27-28.) Hence, the Complaint here in issue does not charge that the Company makes resale-price-fixing agreements, whether express or implied, with its customers. On the contrary, as shown, the Commission officially agrees and finds as a fact that the Company's conduct does not constitute a contract or contracts whereby resale prices are fixed, maintained and enforced. Manifestly, this official finding authoritatively answers and disposes of the charge and conclusion that the Company prevents dealers from freely exercising their fundamental right to sell the property purchased from the Company and owned by them at any price they please.

The Agreed Statement of Facts and the Findings as to the Facts plainly define the essential conduct in issue to be merely this: The Beech-Nut Packing Company, engaged in an entirely private and competitive manufactur-

ing business, (Rec., pp. 29, 36), sells to those dealers alone who are known or believed by it to be desirable and satisfactory customers in all respects (Rec., pp. 30, 37), always dealing with each customer separately (*id.*). The Company merely suggests resale prices to dealers, merely announces that it will refuse to sell to dealers who either do not charge such prices or resell to other dealers who do not charge such prices, and merely refuses to sell to practically all dealers who either do not charge the suggested prices or resell to other dealers who do not charge such prices. (Rec., pp. 31, etc. 38 etc.) When it does sell, however, the Company does not fix, maintain and enforce resale prices by restrictive contracts or agreements, whether express or implied. (Rec., pp. 35, 43.) The Complaint does not charge and the Agreed Statement and Findings do not recite any facts from which the conclusion could be properly drawn that the Company acts in concert with other manufacturers of similar articles or otherwise than in pursuance of its own discretion independently exercised in the normal course of its own individual trade with its own customers, directly and separately, that the Company effects its refusal-to-sell policy with any purpose to create or maintain a monopoly or unduly to restrain trade or with any purpose opposed to good morals. The fact is that dealers buying from the Company receive, upon each sale, a full and unqualified title, possess complete and unrestricted liberty of alienation with respect to the property so bought and owned by them, and are entirely free to resell it as they please, to whom they please, at any price they please. The sole restriction imposed by the Company upon them is the denial of the ability to buy from it unless and until it chooses to sell. Dealers who resell at the prices suggested by the Company do so only because they themselves prefer to do so, for reasons satisfactory to them, and not because

they are obligated or compelled to do so by reason of any restraint imposed by the Company upon their right of freedom to sell. Dealers are under no obligation whatever to buy from the Company, and, having bought from the Company, they are under no obligation whatever to sell other than in the free and independent exercise of their own individual discretion.

Thus, it is indisputable that the essential conduct in issue is in the final analysis, merely this: The independent refusal by a private manufacturer to sell his own lawfully possessed property for a particular reason, without any unlawful purpose. And it is likewise indisputable that such refusal to sell involves but the lawful assertion of the ancient and fundamental right of freedom to trade, existing at common law, which right the antitrust acts were enacted to preserve and protect, and do not impair or destroy. (*United States* v. *Colgate & Co.*, 250 U. S. 300, and cases cited; *Federal Trade Commission* v. *Gratz et al.*, 253 U. S. 421.)

3. *As to the extraordinary charge and finding that the Company's refusal-to-sell conduct involves the use of an unfair and unlawful method of competition within the meaning of Section 5, because it is detrimental to competing manufacturers, in that dealers, generally, prefer*[1] *to buy and sell and prefer*[1] *to push the sale of Beech-Nut products, by reason of the Company's refusal-to-sell policy, rather than the products of other and competing manufacturers who do not effect such a policy, it suffices merely to say that competing manufacturers have no reasonable ground for complaint against either the Company or dealers because such dealers, in the free and independent exercise of their own individual discretion, prefer to*

(1) Preference legally imports the free and independent exercise by dealers of their own individual discretion.

buy and sell and prefer to push the sale of Beech-Nut products for any reason satisfactory to them. Dealers have the clear right to buy from any manufacturer they please, if the manufacturer chooses to sell. They have the clear right freely to exercise their own independent discretion as to the products they will buy, when offered for sale, and, having bought, they have the clear right freely to exercise their own independent discretion in the sale of the products owned by them. And lack or loss of custom by a manufacturer due alone either to mere competition or to the mere exercise by dealers of their fundamental right of freedom to trade, neither constitutes an actionable injury at common law nor provides a basis for a proceeding under the Act. Manifestly, the proposition here advanced by the Commission is patently untenable and absurd, in both fact and law.

> "Competition exists when two or more persons seek to possess or to enjoy the same thing: it follows that the success of one must be the failure of another, and no principle of law enables us to interfere with or to moderate that success or that failure,so long as it is due to mere competition." (Frey, L. J., in *Mogul Steamship Company* v. *McGregor, Gow & Co.*, 23 Q. B. D. 598, 626.)
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> "If one person can by superior energy, by more extensive advertising, by selling a better or more attractive article, outbid another in popular favor, he has a perfect right to do so." (*Brown Chemical Company* v. *Meyer*, 139 U. S., 540, 544.)

We may notice, at the beginning of this discussion, that the facts recited in the Agreed Statement and in the Findings (reproduced from the Agreed Statement and supported thereby) are consistent with the view that competing manufacturers who do not effect such a merchandising policy *do not for that reason* suffer any substantial injury in their business. It will be observed that there is no direct allegation in the Agreed Statement that

competing manufacturers who do effect such a policy do not do so because they themselves voluntarily elect and prefer to do so in their own interest, that competing manufacturers who do not effect such a policy are for that reason injured in their business or that they are finally forced to adopt such a policy because of such injury. Further, there is no direct allegation therein that the products of competing manufacturers who do not effect such a policy are for that reason any the less freely bought and sold in the trade pursuant to the public demand therefor. The only pertinent allegation in the Agreed Statement relating to the alleged injury received by competing manufacturers is this: Dealers generally *prefer* to handle and push the sale of Beech-Nut products because of the policy pursuant to which they are merchandised rather than the similar products of other and competing manufacturers who do not effect such a policy. It may be reasonably presumed, in the absence of any proof to the contrary, that such preference amounts to no more than a state of mind, amounts to no more than a personal opinion and sentiment, and does not actually influence dealers to refuse to buy and sell products not so merchandised, products which the public demands. As a matter of fact, dealers are generally accustomed to carry in stock all products of the class sold by them for which there is a substantial and persistent public demand. They cannot afford to do otherwise in the conduct of a competitive business. We have never heard of any manufacturer who has been substantially injured in his business because he does not effect such a merchandising policy. We have never heard of any manufacturer who because of injury received in his business through a failure to effect such a policy has been forced to adopt that policy against his will. And no facts are recited in the record which in any way support such a charge or conclusion.

If the facts recited in the Agreed Statement and in the Findings (reproduced from the Agreed Statement and supported thereby) are reasonably consistent with the view that competing manufacturers who do not effect such a merchandising policy do not for that reason suffer any substantial injury in their business, in fact, then it must follow that the alleged detriment received by such manufacturers does not exist. It is clear that no method of competition can be held to be unfair and unlawful as to a competitor unless as a direct result thereof the business of such competitor is actually injured. The essential ingredient of the offense is the imposition of an unfair and unnecessary injury upon the business of a competitor. And the Company is entitled to the full benefit of any reasonable doubt arising from the construction of the facts defined by the record. We refer to this possible construction of the facts more as a matter of interest than as a matter of defense. We are not required to rely on any narrow or technical ground of construction to justify the entire lawfulness of the Company's conduct or to demonstrate that the instant proposition advanced by the Commission is wholly untenable and utterly absurd, in fact and law.

Let us now precisely define the relationship actually existing between the Company, its dealers and its competitors, respectively.

We have seen that the Company merely refuses to sell its own property to dealers whose merchandising practices are, in its judgment, detrimental to its own business, to the trade and to the consuming public generally, *for the sole purpose* of protecting its own business and the subsequent purchasers of its products from substantial injury, always acting independently and in good faith in the normal course of its own individual trade without any purpose whatever to create or maintain a re-

straint of trade or monopoly and without any motive whatever to injure the business or do violence to the lawful rights of others. We have seen that the Company does not in fact impose any restraint whatever upon the right of future alienation, in the case of products actually sold, that it gives a full and unqualified title to each purchaser upon each sale. There is no suggestion in the record that the Company attempts to limit the right or ability of dealers freely to buy and sell products of other origin. *In short, both the purpose and conduct of the Company are entirely lawful, and the Company does no more than lawfully to exercise its right of freedom to sell or not, as it pleases, to whom it pleases.*

We have seen, on the other hand, that dealers buy and sell the products of the Company solely because they themselves voluntarily elect and prefer to do so for reasons satisfactory to them, that they receive and possess complete and unrestricted liberty of alienation with respect to the products purchased from the Company and owned by them, that they are entirely free to sell such products at any price they please and to whom they please, that if they resell at the suggested prices it is solely because they themselves voluntarily elect to do so and not because of any restraint imposed upon their right of freedom to sell. *We have seen that dealers are entirely free to buy whatever products they please and are entirely free to sell the products bought and owned by them as they please.* There is no suggestion that dealers conduct their business with any purpose to restrain trade or with any motive to injure the business of others. *In short, both the purpose and conduct of the dealers are entirely lawful, and they do no more than lawfully to exercise their right of freedom to buy and sell as they please.*

It must be presumed that dealers, generally, are of

the deliberate opinion that the Company's said refusal-to-sell policy and the resale prices suggested by it are entirely fair and reasonable and in the best interest of the trade and consuming public because otherwise they would not generally prefer to buy and sell and prefer to push the sale of products merchandised pursuant to such a policy. And the inference is that dealers are of the opinion that the merchandising of products by a manufacturer pursuant to another and different policy, having a contrary effect, is not conducive to the welfare of the industry and trade. The reason for such opinion is clear when it is recalled that the Company's policy is solely purposed and effected to withhold its products from dealers who charge prices which are unreasonably high or unfairly low. Dealers know full well that the charging of unfair and unreasonable prices in the trade demoralizes trade and imposes an unjust injury upon the consuming public.

Hence, it is conclusively established that whatever loss of custom, if any, is suffered by competing manufacturers is due not to the conduct of the Company but solely to the conduct of dealers, and such conduct of the dealers amounts to no more, as stated, than the lawful exercise by them of their right of freedom to buy and sell as they please; that neither the Company nor its dealers in any way wrongfully invade the lawful rights of competing manufacturers or in any way unfairly or unnecessarily injure the business of such manufacturers. Dealers cannot be held legally liable for loss of custom suffered by another through the lawful exercise by them of their right of freedom to buy and sell. Inasmuch as the conduct of the Company does not injure the business of competitors, it cannot be held to constitute unfair and unlawful competition as to such competitors.

This case presents only the normal and lawful con-

duct of buyers and sellers, only the normal and lawful relationship which customarily exists between buyers and sellers and between traders of the same class who are all operating under a highly competitive system. There is involved no more than the normal and inevitable working of the processes of competition and freedom of trade. And under a state of society where the right of freedom to trade is the law of the land manufacturers must always depend upon the decision of dealers as to whether they shall be able to sell, dealers must always depend upon the decision of manufacturers as to whether they shall be able to buy, and both manufacturers and dealers may lawfully exercise their right of freedom to sell the property owned by them as they please.

The Company is under no legal obligation to make or sell. Its competitors are under no legal obligation to make or sell. The dealers are under no legal obligation to buy or sell. Neither the Company nor its competitors can compel dealers to buy or can restrain their right of freedom to sell what they have bought, paid for and own. Neither the dealers nor the Company can compel competing manufacturers to sell or impose any restraint upon their right of freedom to sell. Neither the dealers nor competing manufacturers can compel the Company to sell or impose any restraint upon its right of freedom to sell.

Finally, we direct the attention of the Court to the highly significant fact that nowhere in its brief does the Commission show, or attempt to show, how and why the Company's refusal-to-sell policy is injuriously unfair to competitors, either in purpose or effect. The reason is manifest—it cannot do so. That policy involves no intent to injure competitors in their trade, business or otherwise, without just cause or excuse. That policy involves no unfair and unnecessary injury to competitors

in their trade, business or otherwise. And, if it does not constitute an unfair method of competition as to competitors, it is not within the purview and condemnation of Section 5. In short, that policy neither constitutes actionable unfair competition at common law nor an unfair and unlawful method of competition within the meaning of Section 5.

4. *An analysis of the argument by the Commision in support of its charge and conclusion that the refusal-to-sell policy (the Court will note that this is the Commission's own characterization of the Beech-Nut policy)*[1] *in issue involves the use of an unfair method of competition outlawed by Section 5.* Confronted with the *Miles* (220 U. S. 373) decision, on the one hand, and the *Colgate* (250 U. S. 300), *Schrader* (252 U. S. 85), and *Gratz* (253 U. S. 421) decisions, on the other hand, the dilemma of the Commission is manifest. It must attempt the impossible task of at once bringing this refusal-to-sell policy within the purview and application of the broad principle announced in the *Miles* case and avoid the application of the broad principle announced in the *Colgate* case. That is, it must somehow establish that such policy involves, not the mere lawful exercise of the right of freedom of alienation of movables owned, but, on the contrary, the imposition of an actual restraint upon the right of freedom of alienation of movables sold to and owned by another; that the Company is not merely lawfully asserting its fundamental right of freedom to trade, but is, on the contrary, actually depriving buyers from it of their fundamental right of freedom to trade with respect to the Beech-Nut products bought and owned by them.

The Commission is, of necessity, ultimately driven to rely upon the *Miles* case as authority for its instant

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(1) Commission's Brief, page 71.

charge and conclusion of unfair and unlawful method of competition within the meaning of Section 5. In the final analysis, the whole argument of the Commission concededly boils down to this: *Such refusal-to-sell policy is an unfair method of competition outlawed by Section 5 because it involves, in purpose and effect, the unlawful restraint of trade condemned in the Miles case.* (Com's Brief, p. 38, ff.) And the Commission attempts to bring this policy within the principle announced in the *Gratz* case upon the same ground. That is, such policy not only involves a dangerous tendency unduly to hinder competition, but, indeed, tends to the entire suppression of competition in price in the resale of Beech-Nut products. The Commission argues thus: the price-fixing contracts condemned in the Miles case and the refusal-to-sell policy presented in this case are essentially the same in purpose, character and effect; both are equally unlawful because they involve a scheme, system or plan purposed and effected unduly to restrain trade, i. e., to fix, maintain and enforce resale prices, to deprive dealers of their right freely to sell the property bought and owned by them at any price they please and to prevent them from reselling at prices lower than those fixed by the manufacturer, whereby competition in price in the resale of the products affected is suppressed and destroyed; this refusal-to-sell policy is but a subterfuge and substitute for such system of unlawful contracts, devised upon the announcement of the *Miles* decision to evade its application, the essence of which is the *"standing threat"* (id., p. 47) to refuse to sell. "Actual refusals to sell are of no particular value to respondent; they mean a real loss to it. It is the *power to threaten* (to refuse to sell) that constitutes the chief value of the whole plan. It is the sword of Damocles over the head of every distributor", etc. (Id.) And, in order to bolster up this argument, the

Commission further asserts that the standing announcement by the Company that it will decline sales to dealers who either fail to charge the resale prices suggested by it or resell to other dealers who fail to charge such prices, followed by an actual refusal to sell, results in concerted action between the Company and its dealers amounting to an unlawful combination within the meaning of the Sherman Act, as surely as does a system of resale-price-fixing contracts. In the final two paragraphs of its brief the Commission tersely sums up its argument in the following language:

> "* * * That is to say, the standing announcement of the manufacturer that he will cut off the supplies of all distributors who fail to comply with his merchandising scheme, itself brings about a concert of action as surely as would a system of express agreements. In view of the rule that the provisions of the Sherman law may not be avoided 'by any disguise or subterfuge or form,' it would seem impossible for the concerted action produced by the announced policy of the manufacturer in regard to cutting off supplies, to escape the prohibitions of that act. * * *
>
> "Under the principle laid down in the *Dr. Miles Medical Co.* case, that the maintenance by a manufacturer of resale prices is a restraint of trade under the Sherman law, it would seem to follow necessarily that practices such as are set forth in this record, which are indulged in with the identical purpose and which tend to produce the identical injury to the consuming public, must be held to come within the jurisdiction of this Commission to prevent, if, as shown above, they might under proper allegations and proof, be brought within the prohibitions of the Sherman law itself." (Id., pp. 71, 72.)

We will not attempt to comment upon the obvious confusion of thought involved in the foregoing extraordi-

nary argument. We need only note that the Commission boldly and unequivocally asserts, in substance, that the refusal-to-sell policy here in issue is within its jurisdiction to prevent, under the terms of Section 5, because it involves a restraint of trade unlawful both at common law and under the Sherman Act within the meaning and application of the principle announced in the *Miles* case. And it is further asserted that such policy involves concerted action amounting to an unlawful combination so unduly to restrain trade, within the meaning of that act. The answer to this argument is complete and decisive.

First: The principle announced in the *Miles* case is not that "the maintenance by a manufacturer of resale prices is a restraint of trade under the Sherman law," as the Commission asserts, but rather is this, as Mr. Chief Justice White, speaking for the Court in the *Boston Store* case (246 U. S. 8), said:

> "In *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373, it was decided that under the general law the owner of movables * * * could not sell the movables and lawfully **by contract** fix a price at which the product should afterwards be sold * * *." (Id., p. 21.)

The unlawful combination condemned in the *Miles* case was effected through *such restrictive contracts.* As Mr. Justice McReynolds, speaking for the Court in the Schrader case (252 U. S. 85), said:

> "* * * the parties (that is the manufacturer and his customers) **are combined through agreements** designed to take away dealers' control of their own affairs and thereby destroy competition and restrain the free and natural flow of trade amongst the States." (Id., pp. 99-100.)

And, inasmuch as the Commission officially declares

in the Findings as to the Facts (Rec., p. 43) that "the merchandising conduct of respondent, heretofore defined and as herein involved, does not constitute a contract or contracts whereby resale prices are fixed, maintained, and enforced", it must follow that such policy does not, and cannot be held to, involve an unlawful restraint of trade and an unlawful combination, either in purpose or effect, within the meaning and application of the principle announced in the *Miles* case.

Second: The *Colgate* case conclusively establishes that such a refusal-to-sell policy does not involve an unlawful combination unduly to restrain trade, that such a policy involves but the lawful exercise of the fundamental right of freedom of trade, existing at common law, which both the Sherman Act and the supplemental Trade Commission Act were enacted to preserve and safeguard, and do not restrict or destroy. And, inasmuch as such policy does not involve an undue restraint of trade, as the Commission charges, the findings of the Commission with respect to the alleged economic effect of that policy, solely predicated upon the premise of the presence of an undue restraint of trade, are without support and, therefore, not conclusive.

Third: The question presented is foreclosed by the prior decisions of this Court. Essentially the same argument has been twice urged upon this Court, hitherto, and as many times squarely rejected, first in the *Colgate* case and again in the *Schrader* case. It suffices merely to quote the decisive statement by Mr. Justice McReynolds, speaking for the Court, in the latter case:

> "It seems unnecessary to dwell upon the obvious difference between the situation presented when a manufacturer merely indicates his wishes concerning prices and declines further dealings with all who fail to observe them, and one where

he enters into agreements—whether express or implied from a course of dealing or other circumstances—with all customers throughout the different States which undertake to bind them to observe fixed resale prices. In the first, the manufacturer but exercises his independent discretion concerning his customers and there is no contract or combination which imposes any limitation on the purchaser. In the second, the parties are combined through agreements designed to take away dealers' control of their own affairs and thereby destroy competition and restrain the free and natural flow of trade amongst the States." (*Id.*, pp. 99-100.)

Fourth: This argument is based upon the single fact that dealers, generally, charge the resale prices suggested by the Company. Seizing upon that single fact and wholly ignoring the actual circumstances of the conduct of, and the actual relationship existing between, the Company and its customers, respectively, examined in the light of the terms of the act, reasonably construed to effect its great remedial purpose, and of the applicable principles of law settled by the adjudged cases, whereby the true character of such policy is alone determined, the Commission forthwith jumps to the conclusion that the Company has imposed an unlawful restraint upon the right of freedom of alienation of its customers, the restraint, essentially, condemned in the *Miles* case, but here effected, it is said, by other means. Manifestly, however, that single fact cannot be accepted as conclusive of the imposition of an unlawful restraint of trade. It might just as plausibly and reasonably be argued that the charging of uniform prices for similar and competing articles in trade conclusively establishes, *per se*, the existence of an unlawful combination or conspiracy between their vendors to fix prices in restraint of trade. It is common knowledge that in every community, among both

manufacturers and traders, there are many examples of standard and uniform prices for similar articles which afford no basis for the charge of an unlawful combination or conspiracy in restraint of trade. The daily newspapers in our cities offer a familiar illustration. Many circumstances and reasons, principally economic, properly and inevitably operate to bring about uniformity of methods and prices in trade without involving unlawful conduct.

Fifth: It is an utter confusion of thought to treat an independent refusal to sell to dealers who either fail to charge suggested prices or resell to other dealers who fail to charge such prices as being in the same category with a system of contracts made by a manufacturer with all his customers to fix, maintain and enforce resale prices. On the one hand, we have no question of combination or concerted action. A single manufacturer is merely exercising his own independent discretion as to whom he will sell his own property, dealing with each customer directly and separately. On the other hand, we have a manufacturer and all his customers combined and acting in concert through a system of interlocking contracts designed to fix, maintain and enforce resale prices. On the one hand, we have no unlawful restraint of trade, no qualification of the title of dealers to the property bought from the manufacturer and owned by them, whereby they are, in fact, deprived of their right freely to sell. It is obvious that a mere refusal to sell cannot qualify the title of an article sold, because no title passes. Sales actually made, however, are absolute and unconditional. Buyers receive, upon each sale, a full and clear title, possess complete and unrestricted liberty of alienation, and are entirely free to resell as they please, to whom they please, at any price they please. If they do resell at the suggested prices, it is solely because they

themselves elect and prefer to do so, for some reason satisfactory to them, and not because of any qualification of their title imposed by the manufacturer. On the other hand, there is an unlawful restraint of trade, an actual qualification of the title of dealers to the property bought, paid for and owned by them, whereby they are, in fact, deprived of their right freely to sell. There is a sale, title passes from the manufacturer to the dealer, and the manufacturer seeks by contract to restrict the dealer in the sale of what he owns, to deprive him of his fundamental common law right to name his own price on the sale of his own goods. That is the vice of the restrictive contract, the unlawful restraint of trade condemned in the *Miles* case. On the one hand, we have merely a denial to another of the privilege to buy; on the other hand, a restraint upon the right of freedom of alienation of property sold. It is against all reason and common sense to say that the mere denial to another of the ability to buy in any way constitutes or results in an undue restraint upon his right of freedom to sell. On the one hand, we have the owner of movables asserting the right of freedom to sell them or not as he pleases. On the other hand, we have the seller of movables asserting the right to deprive buyers of their freedom to sell. On the one hand, we have dealers reselling at prices suggested by the manufacturer, solely in the free and independent exercise of their right to sell. On the other hand, we have dealers reselling at prices fixed by the manufacturer, because they are obligated and compelled to do so by reason of restrictive contracts qualifying their title to the property bought. It is too plain for dispute that a manufacturer does not fix, maintain and enforce resale prices, either in fact or law, merely because he selects as his customers dealers who observe prices suggested by him, dealers who are under no obligation or compulsion

whatever to resell the property bought from the Company other than in the free and independent exercise of their own individual discretion. As Judge Hough well said in *Great Atlantic & Pacific Tea Co.* v. *Cream of Wheat Co.* (224 Fed. 566):

> " * * * that defendant *fixes* the resale price, is not, in my opinion, true in point of fact * * * *fixing* connotes enforcement. * * * But mere abstention from dealing cannot *per se* be price fixing, because the price is not made to depend upon any contract or agreement even thought by the parties to be enforcible. To call defendants' acts price fixing is inaccurate and evades obvious legal questions, viz., whether defendant has the right to decline business, and whether it is anybody's business why the business is declined." (*Id.*, p. 572.)

In short, we have, on the one hand, a situation involving merely the normal and entirely legal relationship of manufacturer and customer, and the act of each, incidental to this relationship, is entirely within his lawful rights. Each is but independently asserting the fundamental right of freedom to trade existing at common law. Each is but independently exercising the right of alienation which is one of the essential incidents of a right of general property in movables, the preservation of which right is required by the public interest. There is no unlawful purpose, there is no unlawful contract or combination or conspiracy in restraint of trade, there is no monopoly, actual or attempted. On the other hand, we have an unlawful combination and an unlawful restraint of trade, conduct unlawful in purpose and unlawful in execution.

Sixth: A purpose unduly to restrain trade cannot reasonably be implied from conduct wholly free from any undue restraint of trade, actual or attempted, within the proper and established meaning of that term. The con-

ceded absence of any restrictive contracts or agreements from the conduct in issue conclusively negatives the implication of such an unlawful purpose. And the *Colgate* case is decisive of the proposition that a mere refusal to sell, under the general circumstances here defined, involves, not an undue restraint of trade, but the mere lawful assertion of the right of freedom to trade.

Seventh: The Complaint does not charge and neither the Agreed Statement nor Findings allege or recite any facts from which the conclusion could be properly drawn that the Company, in effecting its refusal-to-sell policy, either engages in any combination or conspiracy in restraint of trade, or engages in any combination or conspiracy to fix, maintain and enforce resale prices, or acts in concert with any of the producers of similar articles, or acts otherwise than alone and solely in pursuance of its own individual discretion independently exercised in the normal course of its own individual trade with its own customers, directly and separately; that its dealers either are engaged in any combination or conspiracy in restraint of trade, or are engaged in any combination or conspiracy to fix, maintain and enforce resale prices, or act in concert in the resale of Beech-Nut products. It is explicitly declared in both the Agreed Statement and Findings that the Company always deals with each customer separately. (Rec., pp. 30, 37.) There is no combination of competing manufacturers; there is no combination of competing dealers; there is no combination of manufacturer and competing dealers tied together by, and acting in concert through, a system of interlocking contracts.

Eighth: If the refusal-to-sell policy in issue is inherently lawful, it is not made unlawful merely because the Commission arbitrarily characterizes it as a "scheme", "system" or "plan". Unlawful conduct is not built out

of a mere verbal characterization, any more than it is built out of the exercise of an undoubted right.

Ninth: Upon analysis, the so-called "scheme", "system" or "plan" is found to consist of no more, in essence, as the terms of the Order establish, than the independent refusal by a private manufacturer to sell its own lawfully possessed property to dealers who are not desired by it as customers because they either do not charge the prices suggested by it or resell to other dealers who do not charge such prices, prices which are fair and reasonable in all respects, and, in the honest judgment of the manufacturer, essential to the welfare of its own business, and in the best interest of the trade and public at large. When it does sell, however, it gives a full and unqualified title to each buyer, upon each sale, and imposes no restraint whatever upon his right of alienation, through restrictive contracts or agreements (whether express or implied), whereby the freedom of each buyer to resell the property owned by him as he pleases, to whom he pleases, at any price he pleases, is complete and unfettered. The sole restriction imposed by this manufacturer upon dealers is the inability to buy unless and until it chooses to sell. Such refusals are made without any purpose either opposed to good morals because characterized by some wrongful element or against public policy because involving undue restraint of trade or monopoly, actual or potential, or the doing of any act otherwise prohibited by law. It is because the constituent elements of such refusal-to-sell policy are entirely lawful that the Commission resorts to its theory of illegal scheme and illegal system. The Commission does not wish this policy to be analyzed because its lawfulness is thereby conclusively established.

Tenth: The single and decisive question of law, in issue, remains precisely that originally put, to wit: Does

either the Sherman Act or the supplemental Trade Commission Act deprive a private manufacturer of the right so to refuse to sell? As a result of the decisions by this Court in the *Colgate, Schrader* and *Gratz* cases, respectively, it is settled that neither of these Acts deprives a private manufacturer of the right so to refuse to sell, since such refusal but involves the mere lawful assertion of the fundamental right of freedom to trade, existing at common law, which right the antitrust acts were enacted to preserve and safeguard, and do not restrict or destroy. The broad principle underlying these cases is that, in the absence of such unlawful purpose and of such unlawful restrictive contracts or agreements, neither the Sherman Act nor the supplemental Trade Commission Act restricts the ancient common law right of a manufacturer or trader, engaged in an entirely private business, freely to exercise his own independent discretion as to whom he will sell, and to announce in advance the terms upon which he will sell and the circumstances under which he will refuse to sell. There can be nothing wrongful or illegal, therefore, in the mere announcement (which the Commission characterizes as a "threat") by a manufacturer that he will do what he has the lawful right to do.

Eleventh: It is not a fact, and there is no evidence in the record to support the charge, that such refusal-to-sell policy was devised upon and subsequent to the *Miles* decision in order to evade its application. It has been commonly used in this country since the beginning of the modern merchandising of articles identified by brand or trade-mark, as a protection against unfair and injurious price cutting.

The Commission presses the further argument that the right to refuse to sell is not an absolute right; that a

wrongful purpose and use may invalidate its exercise otherwise entirely lawful. We do not challenge, of course, these elementary propositions. There can be no doubt, as illustrated by the cases cited by the Commission, that a refusal to sell in pursuance either of an *actual* purpose to create or maintain a monopoly or of an *actual* combination or conspiracy unduly to restrain trade is within the prohibitions of the antitrust law. But, we do deny the charge and conclusion by the Commission that the refusals to sell here in issue are made in pursuance of an unlawful purpose, to-wit, a purpose unduly to restrain trade, that such refusals actually result in an undue restraint of trade. How can such a purpose reasonably be inferred from conduct involving no undue restraint of trade whatever? Concededly there is no purpose to create or maintain a monopoly. Concededly there are no restrictive contracts or agreements (whether express or implied) fixing, maintaining and enforcing resale prices, or otherwise limiting the freedom of buyers to sell. All that we have is the independent refusal by a private manufacturer to sell its own lawfully possessed property. When it does sell, however, it does not qualify the title of buyers, in any respect, by restrictive contracts or agreements (express or implied), whereby they are deprived of their right freely to sell the property bought and owned by them as they please, at any price they please, and to whom they please. Each buyer from the manufacturer receives, upon each sale, a clear, full and unqualified title to the property bought, paid for and owned by him, and is entirely free to resell it in the independent exercise of his own individual discretion. The only restriction imposed by this manufacturer upon dealers is the inability to buy unless it chooses to sell. It is nonsense to say that a mere refusal to sell involves an undue restraint of trade subsequent to sale. Where, therefore, is

the undue restraint of trade in this situation? The fact is that the Commission's official finding that the conduct in issue does not involve contracts or agreements to fix, maintain and enforce re-sale prices conclusively negatives any implication whatever of undue restraint of trade.

The Commission suggests that the policy in issue involves conditional sales. But, there is no such charge in the Complaint, there is no such allegation in the Agreed Statement, and there is no such finding in the Findings as to the Facts. It is a refusal to sell, and not a sale, that is challenged and in issue here. This case involves no conditional sales, no agreements and no contracts relating to goods sold. It is idle, therefore, to indulge in a speculative discussion of the legality of conditional sales. Moreover, the Commission apparently utterly fails to grasp the fundamental distinction, in fact and law, between declining to sell for a reason and selling subject to a condition. And whether a refusal to sell under other circumstances, not present here, may be unlawful, is quite another question with which we are not now concerned.

We thus come to the consideration of the argument by the Commission (Com's. Brief, p. 16) that the *Colgate* case (250 U. S. 300) does not control the decision here and the Circuit Court of Appeals erred in so holding. That Court held that the Commission's conclusion that the Beech Nut refusal-to-sell policy constitutes an unfair method of competition outlawed by Section 5 cannot be sustained "in face of the decision in the *Colgate* case" (Rec. p. 49) that a "similar" policy "constitutes merely the exercise of a man's right to do what he will with his own and is not obnoxious to the Sherman Act" (*id.*) The decision in the *Colgate* case was that, in the

absence of any purpose to create or maintain a monopoly and of contracts limiting the price upon future sales, the Sherman Act does not restrict the right of a private manufacturer independently to suggest resale prices and refuse to sell to any dealer who fails to observe such prices, since such refusal merely involves the exercise of "the right of freedom to trade", existing at common law, which it is "the purpose of the Sherman Act * * to preserve" (id., p. 307). In short, it was held that such a refusal-to-sell policy does not involve a combination in restraint of trade in violation of the Sherman Act, as charged. The broad principle upon which the *Colgate* decision rests is this:

> "In the absence of any purpose to create or maintain a monopoly, the act (the Sherman Act) does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell". (Id.)

The Commission attempts to distinguish the instant case from the *Colgate* case and to avoid the application of the decision and broad principle announced in that case upon these grounds, in substance:

(a) This case involves "a proceeding of an entirely different character, based upon an entirely different statute and brought upon a different theory". (Com's. Brief, pp. 25-26.) That is, the *Colgate* case involved the construction and application of the Sherman Act, a penal statute, prohibiting contracts, combinations and conspiracies in restraint of trade, and the issue was whether the Colgate refusal-to-sell policy constituted an unlawful combination in restraint of trade within the meaning of

that Act, whereas this case involves the construction and application of the Trade Commission Act, not a penal statute, outlawing unfair methods of competition, and the issue is whether the Beech-Nut refusal-to-sell policy constitutes an unfair method of competition. Further, even if a merchandising policy, such as that here in issue, is held not to constitute an unlawful combination in restraint of trade under the Sherman law, it does not necessarily follow that that policy does not constitute an unfair method of competition under the Trade Commission Act. We reply: The Trade Commission Act was enacted to supplement the Sherman Act, as the Commission admits (p. 18), and thus more effectually to secure and protect the fundamental right of freedom to trade, existing at common law, which, as stated, the Sherman Act was enacted to preserve. Both acts contemplate precisely the same great remedial purpose, embody precisely the same public policy, and comprise a single and harmonious legislative plan to protect that fundamental right from violence and destruction. And, if such a refusal-to-sell policy involves but the lawful exercise of the common law right of freedom to trade, as was unanimously and squarely held in the *Colgate* case, how can the Trade Commission Act be held to outlaw it? That Act cannot be reasonably construed and applied to outlaw the proper exercise of the very right it was enacted to preserve. It is wholly immaterial whether the Government characterizes this policy as a "combination in restraint of trade" or an "unfair method of competition," whether it attacks this policy under either the Sherman Act or the Trade Commission Act, the decisive fact still remains that such policy involves no more than the lawful exercise of the fundamental right of freedam to trade, existing at common law, which both acts were enacted to preserve and safeguard, and do not impair

or destroy, no more than the assertion by a manufacturer of his constitutional liberty. And, inasmuch as such refusal-to-sell policy does not involve either an unlawful combination or an unlawful restraint of trade, the entire argument of the Commission falls. Hence, all that the Commission has to say in its brief about "concerted action", "co-operation" and "combination", about the "suppression of competition", the "depriving of dealers of the right freely to exercise their own discretion in the conduct of their own business", and the "enhancing of prices", is wholly without force or significance.

(b) The facts in this case differ materially from those in the *Colgate* case. (Com's. Brief, page 30 ff.) It is said, in substance: even though the decision by this Court in the *Colgate* case could be held to prevent the Commission from requiring the discontinuance of the use of *an identical plan* as an "unfair method of competition" within the meaning of Section 5 of the Trade Commission Act, because not violative of the anti-trust act, as constituting a contract or combination in restraint of trade, the fact still remains that this record discloses many practices employed by the respondent which were not alleged to have been employed by Colgate & Co., which additional practices "are themselves sufficient to brand the 'Beech-Nut policy' as an unfair method of competition" (Brief in support of petition for writ of certiorari, pp. 26-27). We reply:

First: The additional practices, referred to, either involve a mere refusal to sell or are wholly incidental thereto.

Second: Such practices, as defined in the Agreed Statement, are patently lawful in all respects, both *per se* and as here used, as we later show.

Third: The fundamental conduct in issue, as the in-

disputable facts recited in the record establish, the terms of the Order show, and the Commission admits (Com's Brief, p. 59, ff.), is precisely this: the announcement by the Beech-Nut Packing Company that it will refuse to sell, and the refusal by the Company to sell, to dealers who either do not charge prices suggested by it or resell to other dealers who do not charge such prices. And the decisive question presented by this case is whether, in the absence of any purpose to create or maintain a monopoly and of any contracts or agreements (whether express or implied) restricting the right of buyers freely to sell the Beech-Nut products bought and owned by them, such a refusal-to-sell policy, effected by a private manufacturer in the exercise of his own independent discretion, involves the use of an unfair method of competition outlawed by Section 5. If it does not, then that conclusion is in no way affected by the mere fact that these additional practices, otherwise unobjectionable, are employed wholly incidental to such fundamental conduct.

Fourth: The *Colgate* case likewise presented numerous practices. They were summarized by this Court thus:

> "Distribution among dealers of letters, telegrams, circulars and lists showing uniform prices to be charged; urging them to adhere to such prices and notices, stating that no sales would be made to those who did not; requests, often complied with, for information concerning dealers who had departed from specified prices; investigation and discovery of those not adhering thereto and placing their names upon 'suspended lists'; requests to offending dealers for assurances and promises of future adherance to prices, which were often given; uniform refusals to sell to any who failed to give the same; sales to those who did; similar assurances and promises required of, and given by, other dealers followed by sales to

them; unrestricted sales to dealers with established accounts who had observed specified prices, etc." (*United States* v. *Colgate & Co., supra,* p. 303.)

It was held that the fundamental conduct in issue was this: the announcement by Colgate & Co., that it would refuse to sell, and the refusal by the Company to sell, to dealers who failed to charge prices suggested by it. The question in issue was whether, in the absence of any purpose to create or maintain a monopoly and of any contracts restricting the right of buyers freely to sell the Colgate products bought and owned by them, such refusal-to-sell policy, effected by a private manufacturer in the exercise of his own independent discretion, involved a combination unduly to restrain trade in violation of the Sherman Act. And it was held that it did not, that such a refusal to sell is but the lawful exercise of the fundamental right of freedom to trade, existing at common law, which the Sherman Act was enacted to preserve. That conclusion was in no way affected by the presence of the additional practices used wholly incidental to such fundamental conduct.

Fifth: The facts in this case do not differ materially from those in the *Colgate* case, since the Beech-Nut refusal-to-sell policy, in issue here, and the *Colgate* refusal-to-sell policy, in issue in the Colgate case, are essentially identical in character, *and the economic consequence of each is precisely the same.* The essence, the effective and potential factor, of both policies is the refusal to sell, announced and actual; the practical operation of both policies results in confining sales, with exceptions, to dealers who observe the suggested prices; the economic consequence of both policies is the observance of such prices by dealers, wholesale and retail, generally, with exceptions. The Colgate indictment charged and the demurrer thereto admitted that by reason of the Colgate

policy, wholesale and retail dealers throughout the United States, with exceptions, resold at the suggested prices. That is precisely the economic effect of the Beech-Nut policy charged here. The fact that the Colgate policy did not involve a refusal to sell to dealers for the reason that they resell to other dealers who do not charge the suggested prices is an entirely immaterial variation, since the essential character and the economic effect of the two policies remain precisely the same. The Commission charges in this case that the Beech-Nut refusal-to-sell policy is an unfair and unlawful method of competition within the meaning of Section 5 for the reason that it involves an unlawful restraint of trade, whereby buyers of Beech-Nut products are deprived of their right freely to sell the property bought and owned by them, competition in price in the resale of such products is suppressed, and the prices thereof in resale are enhanced. It is also charged that such policy involves an unlawful combination. In the *Colgate* case the Government charged that the Colgate policy constituted an unlawful combination in restraint of trade for precisely the reasons urged by the Commission here and stated above. And, inasmuch as it was unanimously and squarely held in that case that the Colgate policy did not involve either an unlawful combination or an unlawful restraint of trade it must follow that the essentially similar Beech-Nut policy likewise does not involve either an unlawful combination or an unlawful restraint of trade. In the *Colgate* case it was held that the Colgate refusal-to-sell policy involved but the lawful exercise of the fundamental right of freedom to trade, existing at common law, which the Sherman Act was enacted to preserve and does not restrict. Hence, it must follow that the essentially similar Beech-Nut refusal-to-sell policy likewise involves but the lawful exercise of that fundamental right, which the

supplemental Trade Commission Act was enacted more effectually to preserve and does not restrict.

Sixth: The Commission tacitly admits in the proposition stated that the Colgate refusal-to-sell policy is not an unfair method of competition outlawed by Section 5. That being so, how can it reasonably be held that the essentially similar Beech-Nut refusal-to-sell policy, having the same economic effect, is an unfair method of competition outlawed by Section 5? Furthermore, the Commission tacitly admits in the proposition stated that if the Beech-Nut refusal-to-sell policy does not involve either an unlawful combination or an unlawful restraint of trade, as in the case of the Colgate policy, it likewise is not an unfair method of competition within the meaning of Section 5. As stated, the *Colgate* case conclusively establishes that the Beech-Nut refusal-to-sell policy does not involve either an unlawful combination or an unlawful restraint of trade.

Seventh: It may be incidentally noted, in illustration of the significance of these additional practices, that, with two exceptions, they are not *specifically* defined and prohibited in the Order. And, yet, the Commission states that these practices are illegal and sufficient in themselves to brand the Beech-Nut policy as an unfair and unlawful method of competition within the meaning of Section 5.

Let us now examine these additional and alleged illegal practices. Referring to the Company's practice of refusing to sell to dealers for the reason that they resell to other dealers who do not charge the suggested prices, of keeping a factory record of the names of dealers who are not desired by it as customers for the reason that they either do not charge the suggested prices or resell to other dealers who do not charge such prices, of announc-

ing, upon occasion, to its customers, the names of dealers who are not desired by it as customers, and of requesting its customers not to sell such dealers who are not desired by it as customers, the Commission says, in substance: Perhaps the most "drastic" of these practices is that of "*boycott*", for failing to observe suggested prices, of retail dealers with whom the Company has no direct dealings, but who buy their supplies of Beech-Nut products from jobbers, and of "*blacklisting*" such retailers and also the jobbers who sell to them; thus, by the joint action of competing retailers (who do resell at the suggested prices and who may have reported to the Company instances of price cutting by competitors), the Company and the jobbers, a general "*embargo*" is established against such retailers, and, in some instances, against jobbers, "whose only offense is that they have disposed of their own goods at prices satisfactory to themselves"(1); such a combination directed against a so-called "price cutter" is illegal as common law. As authority for this charge of illegal combination at common law, the Commission cites a single case, to wit, *Brown & Allen* v. *Jacobs Pharmacy Co.*, (115 Ga. 429). The Commission also refers to the recent case of *Victor Talking Machine Company* v. *Kemeny* (not yet reported) wherein the Circuit Court of Appeals for the Third Circuit is said to have affirmed a judgment by a District Court in a case arising under the Sherman Law and in-

(1) "Prices *satisfactory* to themselves"? But how can that be when the fundamental charge in this case, as plainly set forth in the Complaint and Findings, is that dealers, by reason of the Company's policy are, in fact, deprived of their right freely to sell Beech-Nut products bought and owned by them at their own prices, at prices satisfactory to themselves, and are prevented from reselling at their own prices, at prices satisfactory to themselves? Thus, the true situation is betrayed and, by its own admission, the Commission affirms the fact that dealers are always entirely free to resell the Beech-Nut products bought and owned by them at prices satisfactory to them, and do, in fact, resell at such prices, whether the prices be those suggested by the Company or not.

volving a refusal to sell. We do not have the opinion of the Circuit Court of Appeals, referred to, before us. Suffice it to say, however, that the *Colgate* case conclusively establishes the principle that, in the absence of any purpose to create or maintain a monopoly, the Sherman Act does not restrict the long recognized right of a manufacturer or trader, engaged in an entirely private business, freely to exercise his own independent discretion as to whom he will sell. As authority for the charge of illegal boycott and blacklisting the Commission cites *Grenada Lumber Co.* v. *Mississippi* (217 U. S. 433) and *Eastern States Retail Lumber Dealers Association* v. *United States* (234 U. S. 600). No case is cited as authority for the charge of illegal embargo. To this argument we reply:

First. The Beech-Nut policy does not constitute *an unlawful embargo, an unlawful combination in restraint of trade, an unlawful boycott, and an unlawful blacklisting* merely because the Commission characterizes it as such.

Second. Nowhere in the record of this case is it charged or suggested that such conduct involves *an unlawful embargo, an unlawful combination in restraint of trade, an unlawful boycott,* and *an unlawful blacklisting.* Such charge and characterization first appear in the Commission's brief.

Third. The term "embargo" is without meaning in private law. Hence, the charge that such conduct involves an *embargo* is without any legal significance whatever.

Fourth. There is neither charge, finding nor conclusion anywhere in the record in this case that such conduct involves an unlawful combination or conspiracy

in restraint of trade. And there are no facts recited in either the Agreed Statement or the Findings from which any such conclusion could be properly drawn. It is neither charged nor found that the Company acts in concert with any of the producers of similar articles or has any relations with anyone other than with its own customers, directly and separately, that its customers act in concert in the resale of Beech-Nut products or have relations with anyone other than with their own customers, directly and separately, in the resale of such products. Moreover, it is officially admitted by the Commission and explicitly declared in both the Agreed Statement and Findings (Rec. pp. 30 and 37) that the Company, in effecting the merchandising policy here challenged, deals with each customer separately. The record discloses no concerted action whatever, no combination of competing manufacturers, no combination of competing dealers, no combination of manufacturer and competing dealers tied together by a system of interlocking restrictive agreements. The record simply presents the case of a single manufacturer, always acting alone and in pursuance of his own discretion independently exercised, always dealing directly and separately with each customer is the normal course of his own individual trade. That such independent dealing, under the circumstances defined, involves no unlawful combination or conspiracy in restraint of trade, either at common law or under the Sherman Act, is conclusively established by the decisions of this Court in the *Colgate* (250 U. S. 300) and *Schrader* (252 U. S. 85) cases, respectively. As to the case of *Brown & Allen* v. *Jacobs Pharmacy Co.* (115 Ga. 429), cited by the Commission as the sole authority for its extraordinary charge that such independent dealing involves an unlawful combination in restraint of trade, it suffices to say that that case presented

an actual conspiracy, an actual combination of competing dealers by concerted action to compel a dealer outside the combinatiin to sell at prices fixed by the combination and, upon his failure so to do, to prevent his securing further supplies from manufacturers and wholesalers.

Fifth. It is manifest that such conduct does not involve an unlawful boycott, either at common law or within the meaning of the antitrust acts, because an unlawful boycott involves a conspiracy. And a conspiracy is "a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful by criminal or unlawful means." (*Pettibone* v. *United States,* 148 U. S. 197, 203.) The doctrine of unlawful boycott rests upon the broad principle of the common law that "intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade, is actionable if done without just cause or excuse. Such intentional action when done without just cause or excuse is what the law calls a malicious wrong. * * * as a rule it is the damage wrongfully done, and not the conspiracy, that is the gist of actions on the case for conspiracy: * * * But what is the definition of an illegal combination? It is an agreement by one or more to do an unlawful act, or to do a lawful act by unlawful means: * * *" (Bowen, L. J., in *Mogul Steamship Co.* v. *McGregor,* 23 Q. B. D. 598, 613, 616.) [1] *There can be no unlawful boycott within the meaning of the antitrust laws, in the absence of an actual combination or conspiracy unduly to restrain trade.* (*Duplex Printing Press Co.* v. *Deering et al.,* 41 Sup. Ct. Rep. 172; *Law-*

(1) See, also, 29 Harvard Law Review, 86; 28 *id.*, 696; 26 *id.*, 259; 20 *id.*, 448.

lor v. *Loewe*, 235 U. S. 522; *Eastern States Retail Lumber Dealers' Association* v. *United States*, 234 U. S. 600; *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418; *Grenada Lumber Co.* v. *Mississippi*, 217 U. S. 433; *Loewe* v. *Lawlor*, 208 U. S. 274; and cases cited.) In the *Gompers* case (*supra*) it was said: "Courts differ as to what constitutes a boycott that may be enjoined. *All hold that there must be a conspiracy causing irreparable damage to the business or property of the complainant.* * * *" (*Id.*, p. 437.) (Italics ours.) And in the recent *Duplex Printing Press Co.* case (*supra*), Mr. Justice Pitney, speaking for the Court, said: "The substance of the matters here complained of is an interference with complainant's interstate trade, intended to have coercive effect upon complainant, and produced by what is commonly known as a 'secondary boycott'; that is, a *combination* not merely to refrain from dealing with camplainant, or to advise or by peaceful means persuade complainant's customers to refrain ('primary boycott'), but to exercise coercive pressure upon such customers, actual or prospective, in order to cause them to withhold or withdraw patronage from complainant through fear of loss or damage to themselves should they deal with it. * * * It is settled by these decisions that such a restraint produced by peaceable persuasion is as much within the prohibition as one accomplished by force or threats of force; and it is not to be justified by the fact that the participants in the *combination or conspiracy* may have some object beneficial to themselves or their associations which possibly they might have been at liberty to pursue in the absence of the statute." (*Id.*, pp. 176, 177.) (Italics ours.) Hence, there can be no unlawful boycott, either at common law or within the meaning of the antitrust acts, by a single manufacturer acting entirely alone and independently, as here, not in combina-

tion, and not in pursuance of a conspiracy. "A combination is, of course, essential to the establishment of a boycott. For an individual to announce that he will no longer trade with a given merchant or manufacturer, and to request the public to likewise refrain, would be futile." (*Eddy on Combinations*, Vol. I, p. 444). *Further, there is not the slightest suggestion in the instant record that, in effecting its refusal-to-sell policy, the Company was actuated by malice.* No facts are recited in the Agreed Statement from which it could be properly inferred that the Company pursued that policy with any intent to damage another in his property, trade or otherwise, that the pursuit of that policy resulted, in fact, in any such damage. Moreover, that policy is fully justified by the real purpose underlying it, to-wit, the legitimate purpose of reasonably forwarding personal interest, of reasonably protecting trade. There is no intent whatever to do wrong to the general public and to limit the rights of others by unduly restraining the free and natural flow of commerce. There is no such consequence. There is but the proper and lawful assertion of the fundamental right of freedom to trade. Acting in entire good faith, without malice and without any design to injure or wrong anyone, but solely to protect its own private business, the trade and the public from the serious injury which flows from unfair price cutting in the course of distribution (the reality and seriousness of which injury the Commission has officially affirmed in its special report upon the subject to Congress, as we have hitherto shown), the Company declines to sell its own lawfully possessed property to dealers who are, in its honest judgment, unfair traders and undesirable customers, because they either do not charge the prices suggested by it or resell to other dealers who do not charge such prices, prices believed by it to be reasonable in all

respects, essential to the welfare of its own business and in the best interest of the trade and public at large. The Company has the clear right so independently to decline to sell in the absence of any unlawful purpose. The Company has the clear right to announce in advance that it will so decline to sell. And, in the absence of malice, the Company has likewise the clear right to appeal to its customers, directly and separately, not to resell Beech-Nut products to dealers who are, in its honest judgment, using methods in their sale which are detrimental to the interest of all concerned. When it does sell, however, buyers receive, upon each sale, a full and unqualified title to the property bought and owned by them and are entirely free to resell it to whom they please. The Company is under no legal obligation to remain silent as to dealers who are, in its honest judgment, unfair distributors of Beech-Nut products. As Judge Hough well said in *Great Atlantic & Pacific Tea Co.* v. *Cream of Wheat Co.* (224 Fed., 566): "If it (the Cream of Wheat Co.) had good right to refuse dealings itself with plaintiff, and without malice asked other people to do the same thing, as far only as Cream of Wheat was concerned, defendant was within its rights." (*Id.*, p. 575.) "* * * any man may, either capriciously or arbitrarily or for cause, decline to have business relations with any other man. Furthermore, if a man feels aggrieved against another, he may go about airing his grievances, providing, of course, that he keeps within lawful bounds, and does not publish that which is slanderous or libelous. He may urge his friends and business acquaintances to refrain from dealing with the party against whom he feels aggrieved" (*Eddy on Combinations*, Vol. I, p. 483.)

Sixth. Likewise, it is manifest that such conduct does not involve an unlawful blacklisting. The term "black

list" [1] has been variously used and defined, as the definitions in the margin indicate.[2] Whether "blacklisting,"

[1] With respect to the origin of the term "blacklist" it has been said: "In labour disputes a different kind of 'black list' has been freely used. Trades-unions have frequently published a list of the names of the men who, during a strike, entered into the employ of the master whose men were 'called out.' This is terrorism, no doubt, but it is scarcely libellous. The first of such lists appeared in 1834, towards the close of the great strike in the building trades; such men were then called 'blacks'; and the Stonemasons' Society issued a list of 'blacks or negro-slaves,' with the woodcut of a black slave in chains at the top, followed by the names of those who had gone in to work during the strike, and had thus helped to defeat their fellow-workmen." (*Encyclopaedia of the Laws of England*, Vol. 2, p. 281.)

[2] "Blacklist. A list of persons thought deserving of censure, punishment, or adverse discrimination; esp., a list of persons stigmatized as bad debtors (as insolvent persons) or untrustworthy (as discharged employees), made for the protection of tradesmen or employers." (*Webster, New International Dictionary.*)

"Blacklist. 1. A list of defaulters; specifically applied to printed lists of insolvents and bankrupts, published officially. Private lists, however, of a more searching character, are furnished by certain societies and private individuals to subscribers, with a view of affording protection against bad debts, fraud, etc.

2. Any list of persons who are for any reason deemed objectionable by the makers or users of the list, as for political or social misconduct, for joining in or assisting a strike, etc.

3. Naut., a list kept on board a man-o-war of delinquents to whom extra duty is assigned as a punishment." (*Century Dictionary.*)

"Blacklisting. A list of names of persons kept for the purpose of prohibiting or recommending against dealings with them. * * * A more general understanding of the term is that it has reference to the practice of one employer presenting to another the names of employees for the purpose of furnishing information concerning their standing as employees; *State* v. *Justus*, 85 Minn., 279. * * * In the reports of the Anthracite Coal Strike Commission, May, 1903, it is described as a combination among employers not to employ workmen discharged by any of the members of the coal combination, and in this sense it is recognized by the legislative enactments in many of the states which prohibit employers from blacklisting an employee with the intent of preventing his employment by others. But many of these acts also contain a provision that they shall not be construed as preventing an employer from furnishing a truthful statement of the cause of the discharge." (*Bouvier, Law Dictionary*, Vol. 1, p. 367.)

"Blacklist. A list of persons marked out for special avoidance, antagonism, or enmity on the part of those who prepare the list or those among whom it is intended to circulate; as where a trades-union 'blacklists' workmen who refuse to conform to its rules, or where a list of insolvent or untrustworthy persons is published by a commercial agency or mercantile association." (*Black, Law Dictionary*, p. 137.)

"Black List. The term given to any list of persons with whom the person or body compiling the list advises that no one should have dealings of the character indicated. Thus the list of defaulters on the Stock Exchange is so named, and various societies and individuals also publish lists with a similar purpose. By section 6 of the Licensing Act, 1902, 2 Edw. 9, c. 28, there is power to put an 'habitual drunkard' if he consents * * * on a list kept by the police, and this renders him liable to a penalty on summary conviction for obtaining intoxicating liquor within three years, and the licensee or other person supplying him is also liable." (*Wharton's Law Lexicon*, p. 117.)

so-called, is actionable at common law depends entirely upon the purpose and circumstances of its use. The controlling principle is this: "At Common Law there was a cause of action whenever one person did damage to another wilfully and intentionally, and without just cause or excuse." (Bowen, L. J., in *Skinner* v. *Shew*, (1893) 1 Ch. 413, 422.) "Such intentional action when done without just cause or excuse is what the law calls a malicious wrong." (Bowen, L. J., in *Mogul Steamship Co.* v. *McGregor*, 23 Q. B. D. 598, 613.) In *Encyclopaedia of the Laws of England* (1906) it is said: "Black List.—A list of persons or firms against whom its compiler would warn the public, or some section of the public; a list of persons unworthy of credit, or with whom it is not advisable to make contracts. Thus the official list of defaulters on the Stock Exchange is a black list; as is *Stubb's Gazette* and many similar periodicals. To put a man's name on such a black list *without lawful occasion* is actionable; and the further publication of such a list will be restrained by injunction. Certain societies or individuals regularly publish to their subscribers lists of persons who have been adjudicated bankrupt, or who have had County Court judgments recovered against them with the object of protecting their subscribers from fraud or bad debts; *indeed, trade could hardly be carried on in the present day without the help of such agencies.*" (*Id.*, Vol. 2, p. 279.).[1] (Italics ours.) The conception of blacklisting hitherto prevailing in the law of this country, insofar as pertinent to this discussion, may be broadly illustrated thus: (*a*) *Blacklisting under the common law.* Blacklisting in pursuance of a conspiracy is actionable at common law. In the leading case of *Matti-*

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(1) The balance of this interesting article should also be noted. It sets forth the conception of actionable blacklisting at common law hitherto prevailing in England.

son v. *L. S. & M. S. Ry. Co.* (3 Ohio Dec. 526) it was held that a petition alleging that the plaintiff had been employed by a railroad company and that, having been discharged, his former employer wrongfully and maliciously combined with other railroad companies to prevent, and did thereby prevent his securing employment with other railroad companies, by reason of which he sustained damages by loss of earnings, states a good cause of action. The court observed that while a railroad company has the right to engage and discharge its own employees it cannot conspire with other railroad companies to prevent their employment of a person previously discharged from its employment. In *Hundley* v. *Louisville & Nashville Rd. Co.* (105 Ky. 162), involving an "action for conspiracy to blacklist," it was held that it is an actionable wrong for a railroad company to enter upon its records a false reason for discharging an employee, where that company has made an agreement with other railroad companies whereby each such company is to keep a record of the reasons for discharging employees, and is not to employ any person discharged as an employee for specified reasons (of which the reason so falsely recorded was one) by any other such company, since, in view of this agreement, "such false entry must be regarded as intended to injure the discharged employee; therefore a malicious act." (*Id.*, p. 166.) "The familiar maxim of the law, '*Ubi jus ibi remedium*,' is considered valuable by all courts. It was this maxim which caused the invention of the form of action called an 'action on the case.' It is the part of every man's civil rights to enter into any lawful business, and to assume business relations with any person who is capable of making a contract. *It is likewise a part of such rights to refuse to enter into business relations, whether such refusal be the result of reason, or of whim,*

caprice, prejudice, or malice. If he is wrongfully deprived of these rights, he is entitled to redress. Every person *sui juris* is entitled to pursue any lawful trade, occupation, or calling. It is part of his civil rights to do so. He is as much entitled to pursue his trade, occupation, or calling, and be protected in it, as is the citizen in his life, liberty, and property. Whoever wrongfully prevents him from doing so inflicts an actionable injury. *For every injury suffered by reason of a violent or malicious act done to a man's occupation, profession, or way of getting a livelihood, an action lies. Such an act is an invasion of legal rights. * * * The company has the right to keep a record of the causes for which it discharges an employee,* but in the exercise of this right the duty is imposed to make a truthful statement of the cause of the discharge. If, by an arrangement among the railroad companies of the country, a record is to be kept by them of the causes of the discharge of their employees, and when they are discharged for certain causes the others will not employ them, it becomes important that the record kept should contain a true statement of the cause of an employee's discharge. A false entry on the record may utterly destroy and prevent him from making a livelihood at his chosen business. Such false entry must be regarded as intended to injure the discharged employee; therefore a malicious act." (*Id.*, pp. 164, 165, 166.) (Italics ours.) In *Blumenthal* v. *Shaw* (C. C. A., Third Circuit, 77 Fed. 954) was sustained an action against a former employer to recover damages which the plaintiff suffered by his wrongful acts in preventing plaintiff from obtaining employment in the particular trade in question and causing his dismissal from places where he had procured work, all of which was done in pursuance of an understanding among the employers in this trade in the district not to employ an apprentice belonging to

another. On the other hand, it was held in *Willis* v. *Muscogee Mfg. Co.* (120 Ga., 597) that where several manufacturing companies agree to enforce the rule that employees must "work a six days' notice when leaving the employ of this mill," to report to each other all employees leaving without compliance therewith, and, except in special cases, not to employ men so reported, such agreement, while voluntary and not enforceable, is not, *in the absence of malice*, an unlawful combination or conspiracy which would make such companies liable to men properly reported for a violation of this rule; but where, however, a company *wrongfully* reported an employee and thus damaged him by preventing his getting work, such company would be liable. And in *Boyer* v. *Western Union Telegraph Co.* (124 Fed. 246) it was held that an employer, having discharged employees for belonging to a labor union, has the right to keep a book containing their names and showing the reason of their discharge, and to invite inspection thereof by other employers, even though the latter, therefore, refuse to hire the discharged employees. See, also, *Trimble* v. *Prudential Life Insurance Co.* (Ct. App. Ky., 64 S. W. 915). With respect to the blacklisting of delinquent debtors by trade associations it has been authoritatively said: "Blacklists in the form of bad-pay lists, cash-before-delivery lists, abstracts of unsettled accounts, lists of delinquent debtors, and the like, adopted by trade associations to lessen credit risks by the interchange among members of accurate information concerning the financial standing of their customers, are usually held to give no ground of action at law for damages to the retail dealer or private citizen who thereby suffers a loss of credit. And this is true even where the constitutions or by-laws of the associations forbid the members, under penalty of fine or expulsion, to extend further credit to the person reported as long as his name

remains on the delinquent list. In some cases there has been a refusal to give relief even where the regulations forbid members to sell for cash to the debtor until he has settled the claim for which he has been listed." (*Trust Laws and Unfair Competition*, p. 732, issued by the Bureau of Corporations, Department of Commerce, March 15, 1915.)[1] (*b*) *Blacklisting under the Sherman Act.* Blacklisting has been condemned under the Sherman Act where used as an instrument of coercion *in pursuance of an actual combination or conspiracy unduly to restrain trade.* (*Duplex Printing Press Co.* v. *Deering, et al.*, 41 Sup. Ct. Rep. 172; *Lawlor* v. *Loewe*, 235 U. S. 522; *Eastern States Retail Lumber Dealers' Association* v. *United States*, 234 U. S. 600; *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418; *Grenada Lumber Co.* v. *Mississippi*, 217 U. S. 433; *Loewe* v. *Lawlor*, 208 U. S. 274; and cases cited.) In *Lawlor* v. *Loewe* (*supra*) Mr. Justice Holmes, speaking for the Court, said: "Whatever may be the law otherwise, that case (*Eastern States Retail Lumber Dealers' Association* v. *United States, supra*) establishes that, irrespective of compulsion or even agreement to observe its intimation, the circulation of a list of 'unfair dealers,' manifestly intended to put the ban upon those whose names appear therein, among an important body of possible customers *combined with a view to joint action and in anticipation of such reports*, is within the prohibitions of the Sherman Act if it is intended to restrain and restrains commerce among the States." (*Id.*, p. 534.) (Italics ours.) In the *Eastern States Retail Lumber Dealers' Association* case (*supra*) it was held that the circulation of a so-called official report (commonly referred to as a "black list") among the members of an association of retail dealers calling

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[1] The balance of this informing article should also be noted.

attention to actions of listed wholesale dealers in selling "direct" to customers, tended to prevent members of the Association from dealing with the dealers listed in the report, and thus directly and unreasonably to restrain trade by preventing it with such listed dealers, and was within the prohibitions of the Sherman Act. This Court, speaking through Mr. Justice Day, said: "A retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself, and may do so because he thinks such dealer is acting unfairly in trying to undermine his trade. * * * *When the retailer goes beyond his personal right, and, conspiring and combining with others of like purpose, seeks to obstruct the free course of interstate trade and commerce and to unduly supress competition* by placing obnoxious wholesale dealers under the coercive influence of a condemnatory report circulated among others, actual or possible customers of the offenders, he exceeds his lawful rights, and such action brings him and those acting with him within the condemnation of the act of Congress, and the District Court was right in so holding." (*Id.*, p. 614.) (Italics ours.) It is manifest that in the absence of monopoly and of any contract, combination or conspiracy in restraint of trade the Sherman Act does not apply to blacklisting.[1] (*c*) *Blacklisting outlawed by state constitution and statute.* At the instance of organized labor provisions have been inserted into the constitutions of several States and statutes have been enacted in a num-

(1) It is interesting to note that even in a suit by the Government against the meat packers, that portion of the decree which restrained the defendants from violating the Sherman Act by "establishing and maintaining rules for the giving of credit to dealers in meats, the effect of which rules will be to restrict competition," was expressly so qualified as not to prohibit the defendants from "establishing and maintaining rules for the giving of credit to dealers where such rules in good faith are calculated solely to protect the defendants against dishonest or irresponsible dealers." (See *Swift & Co.* v. *United States*, 196 U. S. 375.)

ber of States designed to prohibit concerted action by employers to prevent listed workmen from securing employment. Typical anti-blacklisting provisions, constitutional and statutory, are quoted in the margin.[2]

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(1) *Arizona* (*Acts* 1915, p. 8, §1): A blacklist is hereby defined and declared to be any understanding or agreement whereby the names of any person or persons, lists of names, descriptions or other means of identification shall be spoken, written, printed or implied for the purpose of being communicated or transmitted between two or more employers of labor, their bosses, foremen, superintendents, managers, officers or other agents, whereby the laborer is prevented or prohibited from engaging in a useful occupation. Any understanding or agreement between employers, their bosses, foremen, superintendents, managers, officers or other agents, whether written or verbal; and it will make no difference whether the employers, their bosses, foremen, superintendents, managers, officers or other agents act individually or for some company, corporation, syndicate, partnership or society; and it will make no difference whether they are employed or acting as agents for one and the same or different companies, corporations, syndicates, partnerships or societies, it shall come within the meaning of this act.

Connecticut (*Acts* 1909, chap. 153, §1): Any person or any officer or agent of any corporation, company, or firm who shall blacklist any employee, mechanic, or laborer, or publish or cause to be published the name of any employee, mechanic or laborer with the intent and for the purpose of preventing such employee, mechanic or laborer, from engaging in or securing employment from any other person, corporation, company, or firm, or shall in any manner conspire or contrive, by correspondence or otherwise, to prevent such employee, mechanic, or laborer from procuring employment, shall be punished by a fine of not less than fifty and not more than two hundred dollars: *Provided, however*, That the provisions of this act shall not be construed so as to prohibit any person, or any officer or agent of any corporation, company, or firm from giving a truthful statement of any facts concerning a present or former employee of such person, corporation, company, or firm, on the application of such employee or of any person, or any officer or agent of any corporation, company or firm who may be considering the employment of such employee.

Illinois (*Hurd's Rev. Sts.* 1906, Chap. 38, §46): If any two or more persons conspire or agree together, or the officers or executive committee of any society or organization or corporation, shall issue or utter any circular or edict, as the action of or instruction to its members, or any other persons, societies, organizations, or corporations, for the purpose of establishing a so-called boycott or blacklist or shall post or distribute any written or printed notice in any place with the fraudulent or malicious intent wrongfully and wickedly to injure the person, character, business, or employment, or property of another * * * or to do any illegal act injurious to the public trade, health, morals, police, or administration of public justice, or to prevent competition in the letting of any contract by the state, or the authorities of any county, city, town or village, or to induce any person not to enter into such competition * * * they shall be deemed guilty of a conspiracy; and every such offender, whether as individuals or as the officers of any society or organization, and every person convicted of conspiracy at common law, shall be imprisoned in the penitentiary not exceeding five years, or fined not exceeding $2,000, or both.

As a result of the foregoing statement of the principle underlying the common law doctrine of actionable blacklisting and of the meaning and significance hitherto ascribed to the term "blacklisting" in the law of this country, it must be concluded—*First:* the mere characterization by the Commission of the conduct in issue as "blacklisting" is without legal import or effect, since "blacklisting," so-called, may be lawful or unlawful, depending upon the purpose and circumstances of its use. *Second*: the conduct in issue does not involve "blacklisting," in the more generally accepted meaning of that term in law. The Company does no more than this (Rec., pp. 30, 37): It keeps a factory record for its own necessary reference in the conduct of its own personal business of the names of both all its customers and all dealers found or believed by it to be undesirable as cus-

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Minnesota (*Rev. Laws* 1905, §5097): It shall be unlawful for any person, company, or corporation, or any agent, officer or employee thereof, to coerce, require, or influence any person to enter into any agreement, written or verbal, not to join, become, or remain a member of any lawful labor organization or association, as a condition of securing or retaining employment with such person, firm or corporation. It shall be unlawful for any two or more corporations or employers to combine, agree to combine, or confer together for the purpose of interfering with any person in procuring, or in preventing him from procuring, employment, or to secure the discharge of any employee by threats, promises, circulating blacklist, or any other means whatsoever. It shall be unlawful for any comany or corporation or any agent or employee thereof, to blacklist any discharged employee, or by word or writing seek to prevent, hinder or restrain a discharged employee, or one who has voluntarily left its employ, from obtaining employment elsewhere. Every person and corporation violating any of the foregoing provisions shall be guilty of a misdemeanor.

North Carolina (*Acts* 1909, Chap. 858, §2): It shall be unlawful for two or more persons to agree together to blacklist any discharged employee, or to attempt by words or writing or any other means whatever, to prevent such discharged employee or any employee who may have voluntarily left the service of his employer from obtaining employment with any other person or company. Such person violating the provisions of this section shall be guilty of a misdemeanor and shall be fined or imprisoned, or both at the discretion of the court.

North Dakota (*Constitution*, §212): The exchange of "blacklists" between corporations shall be prohibited.

Utah (*Constitution, Article* 16, §4): The exchange of blacklists by railroad companies, or other corporations, associations, or persons, is prohibited.

tomers *for any reason*, e. g., poor credit, dishonest advertising, unfair price cutting, etc. This record is a single and inseparable unit. It is kept exclusively for its own information and reference in connection with its own personal dealings, and is used by its own officers and employees alone for and in pursuance of that purpose. Such a record of customers and of dealers undesirable as customers is obviously essential to the conduct of any efficient manufacturing business. Such a record involves a universal and essential practice in trade. In addition, the Company merely announces to its own customers, directly and separately, on occasion, the names of dealers who are not desired by it as customers for any reason, including the reason that they either do not charge suggested prices or resell to dealers who do not charge such prices, prices which are, in its honest judgment, fair and

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Wisconsin (*Sts.* 1911, §4466b): Any two or more persons, whether members of a partnership or company or stockholders in a corporation, who are employers of labor, who shall combine or agree to combine for the purpose of preventing any person seeking employment from obtaining the same, or for the purpose of procuring or causing the discharge of any employee by threats, promises, circulating blacklists or causing the same to be circulated, or who shall, after having discharged any employee, prevent or attempt to prevent such employee from obtaining employment with any other person, partnership, company or corporation by the means aforesaid, or shall authorize, permit or allow any of his or their agents to blacklist any discharged employee or any employee who has voluntarily left the service of his employer, or circulate a blacklist of such employee to prevent his obtaining employment under any other employer, or who shall coerce or compel any person to enter into an agreement not to unite with or become a member of any labor organization as a condition of his securing employment or continuing therein, shall be punished by a fine of not more than five hundred dollars nor less than one hundred dollars, which fine shall be paid into the State treasury for the benefit of the school fund. Nothing in this section shall prohiibt any employer of labor from giving any other such empolyer, to whom a discharged employee has applied for employment, or to any bondsman or surety, a truthful statement of the reasons for such discharge when requested so to do by such employee, the person to whom he has applied for employment, or any bondsman or surety; but it shall be a violation of this section to give such information with the intent to blacklist, hinder or prevent such employee from obtaining employment; neither shall anything herein contained prohibit any employer of labor from keeping for his own information and protection a record showing the habits, character and competency of his employees and the cause of discharge or voluntary quitting of any of them.

reasonable in all respects, essential to the welfare of its own business and in the best interest of the trade and public at large. The Company keeps no special list of dealers who are undesirable as customers for the particular reason just stated. Such dealers are listed in the general record as and in the manner above described. The Company keeps no special list of dealers for the purpose of prohibiting or recommending against any dealings with them by others. The Company keeps no special list of dealers for the purpose of censure, punishment or adverse discrimination. The Company does not circulate "unfair lists" among, or interchange "unfair lists" with, either manufacturers or dealers for the purpose of preventing the listed dealers from securing furthere supplies of any goods. *Third:* even if the Company's conduct does involve "blacklisting," in the broad and popular meaning of that term, it is not thereby unlawful unless such blacklisting is intentionally effected to damage another, without just cause or excuse, as when used in pursuance of an actual combination or conspiracy unduly to restrain trade. It is indisputable that the Company's refusal-to-sell conduct here in issue does not involve an unlawful combination or conspiracy in restraint of trade. And, as previously stated, there are no facts whatever recited in the Agreed Statement from which it could be in any way inferred that the Company, in pursuing that policy, has been actuated by malice, by any intent to damage another, that that policy results in any damage to another. That such policy is fully justified by a reasonable self-interest, we have previously established. In short, the Company has the right to keep a factory record of the names of all dealers who are not desired by it as customers, for any reason or no reason, for reference and use exclusively in the conduct of its own personal and private business. In the absence of malice,

it has the right independently to announce to its own customers the names of dealers who are not desired by it as customers. *Grenada Lumber Co.* v. *Mississippi* (217 U. S. 433) and *Eastern Retail Lumber Dealers' Association* v. *United States* (234 U. S. 600), cited by the Commission as authority for its charge of unlawful blacklisting here, have no application, since they involved boycott and blacklisting *in pursuance of an actual combination and conspiracy unduly to restrain trade.*

We are thus brought to a brief consideration of the remaining alleged illegal practices involved in the Beech-Nut policy, not present in the *Colgate* case, which practices, the Commission asserts, are sufficient in themselves to brand that policy as an unfair method of competition outlawed by Section 5. They are:

(a) The refusal by the Company to sell to practically all mail-order houses because they frequently sell at cut prices and to practically all dealers who sell Beech-Nut products to such mail-order houses. (*Rec.* pp. 31-32, 38.) We reply: In the absence of any unlawful purpose the Company has a clear right freely to exercise its own independent discretion as to whom it will sell, to refuse to sell its own lawfully possessed property to mail-order houses and to any dealer for any reason satisfactory to it or for no reason at all. This case does not present a refusal to sell in pursuance of an unlawful purpose, as hereinbefore established.

(b) The utilization by the Company of key numbers or symbols stamped or marked upon the cases containing Beech-Nut products to ascertain the identity of dealers who either do not charge the prices suggested by it or resell to other dealers who do not charge such prices. (Rec. pp. 32-33, 39). We reply: It is explicitly declared in both the Agreed Statement and Findings (*id.*) that the Company utilizes such key numbers or symbols to ascer-

tain, *for any purpose whatsoever,* the identity of distributors of particular Beech-Nut products. Such key numbers or symbols were not devised and are not used, in fact, *solely* to identify price cutters and dealers selling to price cutters. *It is a universal and necessary practice for manufacturers of packaged foods so to identify their products.* In the event of the deterioration or spoilage of product or the failure of the immediate container in the course of distribution it is essential to identify both the distributors of the product and the original circumstances of production, in order to ascertain the cause and to provide a remedy. And it is for the purpose of identification of product and distributors under such circumstances that the Company uses such key number or symbols. The identification of product and distributors, subsequent to first sale, is only possible by so numbering or marking the container, which numbers or marks are recorded at the factory for future reference. We know of no law which prohibits the numbering or marking of containers for future identification. The purpose of the use of such numbers or symbols, here, is entirely lawful. And if the Company has the right, under the general circumstances here in issue, independently to refuse to sell to dealers for the reason that they either do not charge the prices suggested by it or resell to other dealers who do not charge such prices, manifestly it has the right so independently to identify such dealers.

(c) The refusal by the Company's salesmen to accept orders from retailers to be filled through jobbers who either do not charge the suggested prices or resell to other dealers who do not charge such prices and the request by the salesmen to the retailers that they name other jobbers. (Rec. pp. 32, 38-39.) We reply: As hitherto repeatedly declared, in the absence of any unlawful purpose (as here) the Company has the unquestioned

right independently to decline to accept orders from retailers or anyone else for any reason satisfactory to it or for no reason. And it is plain that the Company does not exceed its rights in merely *requesting* retailers so to name other jobbers. The record does not state whether retailers thereupon do name other jobbers. It may be reasonably inferred that they do not. If they do not, there can be no criticism. But, even if they do, nothing illegal has been done by either party. The Company only requests and suggests. It does not and cannot compel. The retailers are under no legal or other obligation to buy from the Company. They are entirely free to buy from whom they please. They may freely buy similar products of other origin. The Company is dealing at its peril in an open and free market. It may request retailers until doomsday to buy either from it or through suggested jobbers, but if they prefer to buy otherwise, they may and will do so. The Company is but independently exercising its right of freedom to trade. Retailers are but independently exercising their equal right of freedom to trade. There is no unlawful purpose. Where is the illegality in this situation?

(d) The receipt by the Company of declarations, assurances, statements, promises, and similar expressions from dealers listed as undesirable customers that they intend to charge the prices suggested by the Company and to resell to dealers who charge such prices, whereupon sales are made to them. (Rec. pp. 32, 33, 39, 40.) We reply: This conduct cannot be said to be in any respect illegal in view of the explicit declaration in both the Agreed Statement and the Findings (Rec. pp. 35, 43) that "the merchandising conduct of respondent heretofore defined and as herein involved does not constitute a contract or contracts whereby resale prices are fixed, maintained and enforced." Further, the legal effect of

this conduct must be construed in the light of the fact that the Commission, upon its own motion, amended the Complaint originally issued against the Company to strike out the charge of agreement to fix resale prices therein contained. The amended Complaint contains no such charge. Upon this record it is indisputable that the conduct here in issue involves no agreements, whether express or implied, to fix, maintain and enforce resale prices. That the Commission officially admits and declares. Finally, the fact of the matter is that such declarations, assurances, etc., amount to no more than declarations of intention. They involve no qualification of title. Buyers from the Company are always wholly free to resell the property bought and owned by them as they please, to whom they please, at any price they please. There is no restraint whatever upon their right of alienation. All that they cannot do, so far as the Company is concerned, is to buy from the Company unless it chooses to sell. And the Company chooses not to sell to any dealer who either does not charge fair prices or resells to dealers who do not charge fair prices. If all dealers elect to sell at prices other than those suggested by the Company, as they have the clear right to do, and the Company stands firm upon its refusal-to-sell policy, it goes out of business. But if dealers prefer to sell at the prices suggested by the Company, in the exercise of their own independent discretion, because they recognize the fairness and essential value of such prices, that is their business. They cannot be criticized for doing so, and the Company commits no crime because they do so. And the charge in this case is that dealers continue to deal with the Company because they *prefer* to do so. Preference, of course, imports voluntary action. It imports, also, approval by dealers of the fairness of the prices suggested, of the fairness of the Company's policy.

(e) The Company "requests the cooperation" of dealers with respect to its refusal-to-sell policy. (Rec., pp. 30-31, 37.) Seizing upon the word "cooperation", as so used, the Commission charges *in its Brief* (pp. 24-25, 71-72) that the Company's refusal-to-sell policy involves unlawful "concerted action", unlawful "combination" between the Company and its dealers unduly to restrain trade within the meaning and prohibition of the Sherman Act. We reply: In view of the fact that there is neither charge, allegation nor finding anywhere in the record of this case of either "concerted action" or "combination" between either the Company and its competitors, the Company and its dealers, or the dealers themselves, that both the Agreed Statement and Findings (Rec., pp. 30-31, 37) explicitly declare that the Company deals with each customer separately, that both the Agreed Statement and Findings (Rec., pp. 35, 43) explicitly declare that the merchandizing conduct in issue does not constitute a contract or contracts whereby resale prices are fixed, maintained and enforced, that the Commission elsewhere in its Brief (pp. 28, 38) admits that such policy does not involve an unlawful combination in restraint of trade within the meaning and prohibition of the Sherman Act, that the *Colgate* case conclusively establishes that such a refusal-to-sell policy does not involve an unlawful combination unduly to retrain trade in violation of the Sherman Act, it is idle for the Commission to talk about unlawful "cooperation" unlawful "concerted action" and unlawful "combination". In the concededly complete absence of any unlawful combination within the meaning of the antitrust act, here, there can be no question of unlawful "cooperation", of unlawful "concerted action". The Agreed Statement and Findings plainly and unmistakably affirm the fact that the word "cooperation", as so used, merely refers to the Company's inde-

pendently effected refusal-to-sell policy, and to nothing else. As so used it means no more than this: the Company independently requests each of its customers, directly and separately, to observe the resale prices suggested by it. That is all there is of it. We may incidentally note that in its effort somehow to distinguish the *Colgate* case the Commission advances the extraordinary proposition that that case did not decide "the question whether Colgate & Co. had entered into a combination * * *, having in view the maintenance of resale prices, but not effected by means of a system of restrictive contracts such as existed in the *Dr. Miles* case", whereas this case involves an actual combination to fix prices in restraint of trade, by means of this refusal-to-sell policy instead of by means of a system of restrictive contracts, precisely the same combination in restraint of trade, *in effect*, condemned in the *Miles* case, wherefore the Court below clearly erred when it adopted the view that the Colgate decision prevented it from holding that a combination existed in the present case. (Com's Brief, pp. 24-25.) In reply we may state that the single and precise charge in the *Colgate* case was that Colgate & Co., by means of its said refusal-to-sell policy—(not by means of a system of restrictive contracts)—knowingly and unlawfully created and engaged in a combination with its wholesale and retail dealers for the purpose and with the effect of procuring their adherence to the resale prices fixed by it and of preventing them from reselling Colgate products at lower prices, thus suppressing competition in price amongst such dealers in the resale of such products in restraint of trade in violation of the Sherman Act. (*United States* vs. *Colgate & Co.*, *supra*, pp. 302-303.) And both the District Court and this Court squarely held that such a refusal-to-sell policy does not constitute an unlawful combination unduly to restrain trade, as charged. And with respect to the assertion

that the essentially similar Beech-Nut refusal-to-sell policy involves an unlawful combination in restraint of trade, we need only refer to the decisions by this Court in the *Colgate* and *Schrader* cases.

(f) The Company declares to its customers that the Beech-Nut policy means that, "*as far as we legally may,*" it will provide "such protection as will insure to Beech-Nut distributors the full profit to which they are entitled for their efforts". Rec., p. 31). It suffices, in reply, to state that the word "protection", as so used, merely refers to the refusal-to-sell policy in issue, which policy involves but the lawful assertion by the Company of the fundamental right of freedom to trade, existing at common law, which the Trade Commission Act was enacted more effectually to preserve and protect, and does not impair or destroy.

Finally, we again direct the attention of the Court to the highly significant fact that the Commission nowhere in its Brief argues that the Beech-Nut refusal-to-sell policy, here in issue, is an unfair method of competition outlawed by Section 5, *because injuriously unfair to competitors.* Unless such policy is, in fact, injuriously unfair to competitors, it is not within the condemnation of Section 5. And we have hitherto conclusively established that such policy is not unfair as to competitors.

Conclusion.

The judgment of the Circuit Court of Appeals for the Second Circuit setting aside the Order of the Federal Trade Commission should be affirmed.

CHARLES WESLEY DUNN,
Counsel for Respondent.

APPENDIX

The Great Remedial Purpose Contemplated by Section 5 of the Federal Trade Commission Act Is Established by the History of Its Enactment.

On January 20th, 1914, President Wilson addressed the Congress on "the subject of additional legislation regarding the very difficult and intricate matter of trusts and monopolies," and recommended, *inter alia*, the enactment of a statute creating an interstate trade commission. As a result the Trade Commission and Clayton Acts were enacted.

The Trade Commission Act was originally H. R. 15613 (63d Cong., 2d Sess.), introduced by Mr. Covington on June 5th, 1914, was finally passed by the Senate on September 8th, 1914, five votes being recorded in the negative, and by the House on September 10th, 1914, no votes being recorded in the negative, and was approved by the President on September 26th, 1914. The Clayton Act was approved on October 15th, 1914.

Section 5 was not incorporated in H. R. 15613 in the form originally passed by the House. Its history is briefly this: On May 22nd, 1914, during the course of the debate on H. R. 15613 in the House, Mr. Stevens (of New Hampshire) offered an amendment to Section 11 thereof incorporating the substance of the present Section 5. This amendment, however, was held to be out of order because not germane. (Cong. Rec., 63d Cong., 2d Sess., pp. 9059-9061.) Subsequently this amendment was submitted to and approved by the President and was thereafter accepted by the Senate Committee on Interstate Commerce, in a modified form. (Id., p. 11537.) Section 5 first officially appeared in Senate bill 4160, recommended by the Senate Committee on Interstate Commerce as a substitute for H. R. 15613. The form of the declaration contained in Section 5 was evolved thus:

First: "That unfair or oppressive competition in commerce is hereby declared unlawful. The commission is hereby empowered and directed to prevent corporations engaged in commerce from using unfair or oppressive methods of competition." (Form originally proposed by Mr. Stevens of New Hampshire.)

Second: "That unfair competition in commerce is hereby declared unlawful. The commission is hereby empowered and directed to prevent corporations from using unfair methods of competition in commerce." (Form of Section 5 recommended by Senate Committee on Interstate Commerce in Senate bill 4160.)

Third: "That unfair competition in commerce is hereby declared unlawful. The commission shall have authority to prevent such unfair competition in commerce in the manner following," etc. (Form of Section 5 when first passed by Senate.)

Fourth: "That unfair methods of competition in commerce are hereby declared unlawful. The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce." (Present form of Section 5 in statute.)

Mr. Covington was in charge of H. R. 15613 during the debate in the House, acting as the official representative of the House Committee on Interstate and Foreign Commerce. In the Senate, Mr. Newlands, Chairman of the Senate Committee on Interstate Commerce and official sponsor of this bill, Mr. Cummins and Mr. Hollis delivered the principal addresses in support thereof.

The burden of explaining and defending this bill throughout the exceedingly active and extended debate in the Senate largely fell upon Mr. Newlands and Mr. Cummins. The debate in the Senate centered around Section 5, the policy, value and validity of that section being vehemently assailed by several senators.

An examination of the official reports and statements made in Congress in connection with the introduction and consideration of H. R. 15613, and of the debates upon this bill, clearly indicates the causes which led to the enactment of the Trade Commission Act, the motive of Congress in passing it and the great remedial purpose contemplated by this Act, as a whole, and by Section 5, in particular, to-wit:

(a) *The Federal Trade Commission Act, as a whole, was purposed to supplement and strengthen the Sherman Act, to make the policy, principle and enforcement of that statute more effectual.* Congress thereby intended to enforce a more complete and certain realization of the fundamental right of freedom to trade, existing at common law, which right the Sherman Act established as the law of the land, and more securely to preserve, maintain and protect competition from violence and destruction through restraint of trade and monopoly.

> "* * * The average business man is convinced that *the ways of liberty* are also the ways of peace and the ways of success as well; * * * *What we are purposing to do, therefore, is happily, not to hamper or interfere with business as enlightened business men prefer to do it, or in any sense to put it under the ban.* * * * The best informed men of the business world condemn the methods and processes and consequences of monopoly as we condemn them; and the instinctive judgment of the vast majority of business men everywhere goes with them. We shall now be their spokesmen. * * * *It will be understood that our*

*object is not to unsettle business or anywhere seriously to break its established courses athwart. On the contrary, we desire the laws we are now about to pass to be the bulwarks and safeguards of industry against the forces who have disturbed it. * * * We are all agreed that 'private monopoly is indefensible and intolerable,' and our program is founded upon that conviction. * * **

"The business of the country awaits also, has long awaited and has suffered because it could not obtain, further and more explicit legislative definition of the policy and meaning of the existing antitrust law. Nothing hampers business like uncertainty. Nothing daunts or discourages it like the necessity to take chances, to run the risk of falling under the condemnation of the law before it can make sure just what the law is. Surely we are sufficiently familiar with the actual processes and methods of monopoly and of the many hurtful restraints of trade to make definition possible, at any rate up to the limits of what experience has disclosed. These practices, being now abundantly disclosed, can be explicitly, and item by item forbidden by statute in such terms as will practically eliminate uncertainty, the law itself and the penalty being made equally plain.

"And the business men of the country desire something more than that the menance of legal process in these matters be made explicit and intelligible. They desire the advice, the definite guidance and information which can be supplied by an administrative body, an interstate trade commission.

"The opinion of the country would instantly approve of such a commission. *It would not wish to see it empowered to make terms with monopoly or in any sort to assume control of business, as if the Government made itself responsible. It* demands such a commission only as an indispensable instrument of information and publicity, as a clearing house for the facts by which both the public mind and the managers of great business un-

dertakings should be guided, and as an instrumentality for doing justice to business where the processes of the courts or the natural forces of correction outside the courts are inadequate to adjust the remedy to the wrong in a way that will meet all the equities and circumstances of the case.

"Producing industries, for example, which have passed the point up to which combination may be consistent with the public interest and the *freedom of trade,* can not always be dissected into their component units as readily as railroad companies or similar organizations can be. Their dissolution by ordinary legal process may oftentimes involve financial consequences likely to overwhelm the security market and bring upon it breakdown and confusion. There ought to be an administrative commission capable of directing and shaping such corrective processes, not only in aid of the courts but also by independent suggestion, if necessary. * * * We are now about to write the additional articles of our constitution of peace, the peace that is honor and *freedom* and prosperity." (Address of President Wilson to the Congress, January 20, 1914, Cong. Rec., 63d Cong., 2d Sess., pp. 1962-1964)* (Italics ours).

"*Recent decisions of the Supreme Court make clear that all combinations in restraint of trade and monopolies are contrary to the law. All agree that while the Sherman law is the foundation stone of our policy on this question, additional legislation is necessary.*

"*Experience in the execution of the law, however, as shown in the Standard Oil and American Tobacco decrees of dissolution, and in the frequent*

* It is interesting, as well as pertinent, to observe that, in suggesting the consideration of legislation relating to interlocking stock ownership in industrial corporations, President Wilson used this language: "We do not wish, I suppose, to forbid the purchase of stocks by any person who pleases to buy them in such quantities as he can afford, or in any way arbitrarily to limit the sale of stocks to bona fide purchasesrs." Here is a clear recognition of the fundamental right to buy and sell as one pleases, effected independently in bona fide transactions.

efforts of combinations to make voluntary adjustment with the Department of Justice, establishes that the question involved is administrative as well as legislative and judicial.

"*It is generally conceded that the peculiar character and importance of this question make it indispensable that some of the administrative functions should be lodged in a body specially competent to deal with them,* by reason of information, experience, and careful study of the business and economic conditions of the industry affected. The knowledge of the law and the information as to the facts which are essential to prove that a combination is repugnant to the law are not likely to be entirely adequate for the determination of the best form of dissolution, and this has been recognized both by the Supreme Court and by the Department of Justice. Preliminary to the judicial determination of such questions as arise, for example, in the examination of proposals for a voluntary dissolution of a combination or in testing the lawfulness of existing business arrangements, a vast mass of information in numerous branches of industry, as well as expert knowledge, is indispensable. The proper enforcement of the Sherman law also requires vigilant supervision which is most effectively obtained by a body in continual touch with the business organizations in the various industries.

"The value of such administrative oversight and control has been recognized in the banking and transportation business, and we have in the Comptroller of the Currency, the newly created Federal Reserve Board, and the Interstate Commerce Commission practical illustrations of the operation of such organizations and frequent examples of the beneficial effects of their activity. As the general realization of these facts is widespread and confined to no one particular party, the introduction of this bill for a trade commission simply responds to a general need. * * *

"The establishment of a trade commission at the same time that the Interstate Commerce Commission was established *would have prevented the extraordinary development of monopolistic organizations in industry.* If this commission had been in existence during this period, we would not now have to deal with such organizations as the United States Steel Corporation, the International Harvester Co., or the American Sugar Refining Co.; the American Tobacco Co. would never have been organized, and even the Standard Oil Co. would not have survived the dissolution of the original Standard Oil Trust in 1892. Such a Commission would have at least kept within limited bounds the activities of a multitude of price-fixing associations in different branches of business, which together with the great trusts, have been potent causes of the present high cost of living. * * *

"Others hold that *private monopoly is intolerable, unscientific, and abnormal, but recognize that a commission is a necessary adjunct to the preservation of competition and to the practical enforcement of the law.* * * * *The Commission which is proposed by your committee in the bill submitted is founded upon the latter purpose and idea.* It certainly would appear to be the part of wisdom in so important a situation to proceed carefully, and with that end in view *the committee has aimed to provide a body which will have sufficient power ancillary to the Department of Justice to aid materially and practically in the enforcement of the Sherman law* and to aid the business public as well, and, incidentally to build up a comprehensive body of information for the use and advantage of the Government and the business world. * * * At the same time *the bill clothes it with sufficient power to be, we believe, of material assistance to the Department of Justice in the enforcement of the Sherman law,* and of material aid to the business world in building up a body of precedent in the matter of business practices. * * *

"The commission is also authorized to aid the

courts in the form of the decree to be entered in suits under the anti-trust acts anl to make investigation as to the manner in which such decrees are being carried out, as to whether they are being violated, and what, if any, further order, decree, or relief is advisable, reporting its findings on these subjects to the Attorney General. It is also authorized, if it believes from its inquiries that any corporation has violated any law of the United States regulating commerce to report its findings and the evidence relating thereto to the Attorney General.

"These powers, partly administrative and partly quasi judicial, are of great importance and will bring both to the Attorney General and to the court the aid of special expert experience and training in matters regarding which neither the Department of Justice nor the courts can be expected to be proficient.

"With the exception of the Knight case, the Supreme Court has never failed to condemn and to break up any organization formed in violation of the Sherman law which has been brought to its attention; but the decrees of the court, while declaring the law satisfactorily as to the dissolution of the combinations, have apparently failed in many instances in their accomplishment simply because the courts and the Department of Justice have lacked the expert knowledge and experience necessary to be applied to the dissolution of the combinations and the reassembling of the divided elements in harmony with the spirit of the law." (Report of Senate Committee on Interstate Commerce, to accompany H. R. 15613, Report No. 597, 63d Cong., 2d Sess., Cong. Rec., Id., pp. 11086-11099.) (Italics ours.)

"The truth is that the administration idea and the idea of business men generally is for the preservation of proper competitive conditions in our great interstate commerce. That equal and complete freedom in business which is the way of peace and of success as well is best promoted by the un-

restrained and uncontrolled genius and industry of the American business man." (Mr. Covington, Cong. Rec., 63d Cong., 2d Sess., pp. 8840-8841.)

"They (the conferees) approached it (subject of creation of Federal Trade Commission) * * * with a firm determination to place upon the statute book as beneficent a piece of legislation as they could, to deal with the preservation of those competitive conditions of industry and business in this country which we all recognize as essential to our well-being. The conferees believe they have produced such a piece of legislation." (Mr. Covington, Id., p. 14933.)

"The need has long been felt for an administrative board which would act in these matters in aid of the enforcement of the Sherman anti-trust law." (Mr. Newlands, Id., p. 10376.)

"The commission is organized for the enforcement of the Sherman anti-trust law." (Mr. Newlands, Id., p. 12734.)

"Mr. President, the powers of this commission are to be in aid of existing law—first, in aid of the courts; second, in aid of the Attorney General; third, in independent investigations which will bring to sight violations of the law, the obligation being imposed upon the commission of bringing these violations to the attention of the Attorney General." (Mr. Newlands, Id., p. 12747.)

"We are here endeavoring to sustain competition; that is the primary purpose of the anti-trust law; it is the chief object of all these laws we are now proposing; it is the only justification for the establishment of a trade commission; for if we do not desire to maintain the competitive force as a part of our industrial commercial life, then all these things are necessary." (Mr. Cummins, Id., p. 11104.)

"We have adopted in this country the policy of competition. We are trying to preserve competition as a living, real force in our industrial life; that is to say, we are endeavoring to maintain among our business people that honorable rivalry

which prevents one from exacting undue profits from those who may deal with him because some one else, his competitor, will be willing to accept reasonable profits in the same business." (Mr. Cummins, Id., p. 11379.)

" * * * Every line and letter of the bill before the Senate is intended to strengthen the anti-trust law. It is intended to enforce still more effectually the principle of the anti-trust law. There is not to be found in this bill, from the beginning to the end, the thought that any concert or combination destructive of free, full competition should be permitted to exist." (Mr. Cummins, Id., p. 11380.)

As I have already remarked the bill before the Senate is in harmony with the purpose of the anti-trust statute. It has no other office except to render the principle of that statute more effectual than it is now." (Mr. Cummins, Id., p. 11381.)

"The President of the United States is to be applauded and complimented for his wisdom in recommending to the Congress that we make the anti-trust statute an instrumentality more effective for the preservation of independent and honorable rivalry in business than it has been or is likely to be without the supplemental enactments to which I have in a general way referred." (Mr. Cummins, Id., page 11385.)

"I assert that this bill is a vigorous and honest effort to make competition stronger in its fight against monopoly. I assert—and that no one, I am sure, will question—that it is the purpose, the motive of every member of the committee who believes in the bill, to vitalize competition and to make it enduring and effective. That, however, is not enough. I assert that this will be the effect of the bill when it is carried faithfully into execution. * * * What have we done here? We have announced a commission that is intended to strengthen the anti-trust law in the first instance. Its most valuable work will be in the discovery of offenses against the law and in rendering assistance to the

courts and to the Department of Justice in the administration of the law. Not a line of the law is to be repealed. Not a principle of the law is to be overturned. It is to remain in all its vigor, untouched, unimpaired, with the additional force in administration which this commission will confer upon it. What is the purpose of the anti-trust law? * * * the purpose of the anti-trust law is free, full, complete competition in the business of the United States. (Mr. Cummins, Id., page 12919.)

"Mr. President, upon the whole I believe that the commission which we propose to create will be helpful to the people of the country; that its work will result in a more rigid and benficent enforcement of the act of 1890. I believe that its administration of secton 5 will prevent the growth and development of many a mighty power which the Government would be almost powerless to overcome if we permit it to strike its roots so deeply in the business of the United States as many a combination has now planted itself in the body of our commercial fabric." (Mr. Cummins, Id., page 12920.)

(b) *The fundamental purpose of Section 5 of the Federal Trade Commission Act is to prevent the use of the means whereby restraint of trade and monopoly, prohibited by the Sherman Act, are most effectively created and maintained, as experience has indicated, in the absence of control of a natural resource or of transportation, viz., unfair methods of competition, and thus to stop restraint of trade and monopoly at the threshold, or, as one Senator put it, "to nip restraint of trade and monopoly in the bud,"—in a word, more completely to sustain and safeguard the common law right of freedom to trade.* Congress plainly intended through this section to reach and strike down those unfair methods of competition which violate the rights of competitors, contrary to the public welfare, tend toward and ultimately result in the

destruction of competition and the introduction of restraint of trade and monopoly, which methods, however, do not separately and of themselves amount to an offense against the Sherman Act. The long experience of the enforcement of that Act clearly demonstrated the real need for such a supplemental statute in order to destroy the chief source and weapon of monopoly and to liberate commerce from the menace of *threatened and incipient* restraint of trade and monopoly, just as the Sherman Act had liberated it from the menace of *actual* restraint of trade and monopoly. It was found that the existing anti-trust law was deficient in this respect. In short, the main cause which led to this legislation was the thought that it was required by the economic conditions of the times, that is, *it was required more effectually to maintain the common law right of the individual to freedom to trade and more securely to protect the free exercise of that right from threatened and actual destruction by the evil economic forces of restraint of trade and monopoly.*

> "Section 5 declares unfair methods of competition to be unlawful and empowers the Commission, after hearing, to order the discontinuance of the use of such methods.
>
> "*It is now generally recognized that the only effective means of establishing and maintaining monopoly where there is no control of a natural resource or of transportation, is the use of unfair competition. The most certain way to stop monopoly of the threshold is to prevent unfair competition.* This can be best accomplished through the action of an administrative body of practical men thoroughly informed in regard to business, *who will be able to apply the rule enacted by Congress to particular business situations so as to eradicate evils with the least risk of interfering with legitimate business operations.*" (Statement by Managers on the part of the House, to accom-

pany Conference Report No. 1142, re H. R. 15613, 63d Cong., 2d Sess., Cong. Rec., Id., p. 14924.) (Italics ours)

"One of the most important provisions of the bill is that which declares unfair competition to be unlawful, and empowers the Commission to prevent corporations from using unfair methods of competition in commerce by orders issued after hearing, restraining, and prohibiting unfair methods of competition, which orders are enforcible in the courts. * * *

"It is believed that the term 'unfair competition' has a legal significance which can be enforced by the commission and the courts, and that it is no more difficult to determine what is unfair competition than it is to determine what is a reasonable rate or what is an unjust discrimination. The committee was of the opinion that it would be better to put in a general provision condemning unfair competition than to attempt to define *the numerous unfair practices*, such as local price cutting, interlocking directorates, and holding companies, *intended to restrain substantial competition.*" (Report of the Senate Committee on Interstate Commerce, to accompany H. R. 15613, Report No. 597, 63d Cong., 2d Sess., Cong. Rec., Id., p. 11090.) (Italics ours.)

"It was only when the trade commission bill and the anti-trust bill reached the Senate that it became a much-mooted and very open question what was the best and most effective way to deal with various practices of unfair or destructive competition which, if permitted to go on unchecked and uncontrolled, become potential for restraint of trade or monopoly. * * * It is now generally recognized that the only effective means of establishing and maintaining monopoly where there is no control of a natural resource or of transportation, is by the use of unfair competition. The most certain way to stop monopoly at the threshold is to prevent unfair competition. This can be best accomplished through the action of an administrative

body of practical men thoroughly informed in regard to business who will be able to apply the rule enacted by Congress to particular business situations so as to eradicate evils with the least risk of interfering with legitimate business operations. * * * We are seeking here not to enter into any unknown or speculative realm of the law but to deal, as we ought to deal, with those practices of unfair trade in their incipient stages which if left untrammeled and uncontrolled become the acts which constitute in their culmination restraint of trade and monopoly and the groundwork of the trusts which have menaced us industrially. * * * With the proposition settled of dealing with unfair competition detrimental to the public and potential for restraint of trade or monopoly, by a prohibition such as this act contains, * * *" (Mr. Covington, Cong. Rec., 63d Cong., 2d Sess., pp. 14925, 14927, 14929, 14931.)

"This Trade Commission bill will do three things of importance and benefit to the American people. * * * Last, and to my mind the most important one, it will give to this commission the power of preventing in their conception and in their beginning some of these unfair processes in competition which have been the chief sources of monopoly. That part of the bill is practically new, and yet it has grown out of experience with other legislation. In the enforcement of the Sherman anti-trust law, it has been disclosed in practically every case which the government has brought against the big combinations, the Standard Oil case, the Tobacco case, the Thread case, the Bathtub case, that the chief means of destroying competition by big combinations was by the use of methods which were distinctly unfair and oppressive. * * *

What we wish to do and ought to do above every thing else is to prevent the growth of monopoly at the beginning. Private monopoly in this country must be based upon either one of two factors:

It must be based upon the possession of certain limited natural resources or it must be based upon the misuse of the power that goes with large business. * * * The power to carry on business in large units, to a certain extent, efficiency in cost, in selling methods and better service and better goods for the public, but with a large organization with the immense amount of capital which is at their disposal with the large volume of business, there goes the power absolutely to drive out competitors by the use of unfair methods of competition." (Mr. Stevens of New Hampshire, Id., p. 14941.)

"The Senator must recollect that the provision with reference to unfair competition is intended to disarm monopoly. It is monopoly, or the corporation possessing monopolistic tendencies, that engages in unfair competition, and unfair competition is a means of creating monopoly. We want competition, it is true, but we want a civilized competition, and not a brutal warfare in which the powerful can destroy the weak." (Mr. Newlands, Id., p. 11235.)

"* * * we know, as a matter of fact, that these practices (i. e., unfair methods of competition) are, as a rule, indulged in by powerful organizations with a view to destroying competitors, and that unfair competition is a means of creating monopoly." (Mr. Newlands, Id., p. 11602.)

"My belief is that this phrase (i. e., "unfair competition") will cover everything that we want, and will have such an elastic character that it will meet every new condition and every new practice that may be invented with a view to gradually bringing about monopoly through unfair competition." (Mr. Newlands, p. 12024.)

"There are numerous practices tending toward monopoly that may not come within the provisions of the anti-trust law and amount to a monopoly or to monopolization. We want to check monopoly in the embryo. Monopoly commences in insidious

ways, by practices that are against good morals and constitute violations of individual rights for which the individual can have an action at law or in equity, but rights which the individual, because of his poverty or of his insignificance, is often unable to assert against these great organized powers. The very purpose of this bill is to protect small business against giant competitors just as we protected the shippers of the country against giant railroad combinations when already there were remedies both at law and in equity in favor of the shippers. * * * the anti-trust law is either inadequate to cover all the conditions that gradually lead up to monopoly, or else the machinery for the administration of that law is and has been so ineffective as not to accomplish its object." (Mr. Newlands, Id., p. 12030.)

"I want to do the same thing * * * to prevent the stifling of competition by unfair methods." (Mr. Newlands, Id., p. 12211.)

"* * * and a further provision contained in section 5 which takes hold of unfair practices in competition that tend toward the creation of monopoly by the destruction of fair competition. It will be seen, therefore, that this is not a substitute for the anti-trust law but is in aid of the enforcement of the anti-trust law and is intended to take hold of those practices in trade which inevitably in the end lead toward the creation of a monopoly and the increase of monopolistic power." (Mr. Newlands, Id., p. 12734.)

"The only other extra matter of jurisdiction that is imposed upon this commission is to ascertain whether unfair practices exist and to condemn them. * * * we all know that such practices are resorted to simply by the powerful with a view to destroying the weak." Mr. Newlands, Id., p. 12747.)

"The interstate trade commission is organized with a view to laying bare the methods and the organization and the practices that constitute

monopoly. It is organized for the purpose of aiding the courts in destroying monopoly. It is organized for the purpose of aiding the Attorney General in the prosecution of his duties in the destruction of monopoly. All that it does in the accomplishment of the destruction not only of monopoly but of monopolistic practices which ultimately end in monopoly and which are the embryo of monopoly is to add to the condemnation of the practices which constitute unfair competition. The destruction of unfair competition does not give an immunity bath to monopoly anywhere. On the contrary, the destruction of unfair competition prevents these organizations from growing in strength and power and in the development of their monopolistic practices and control." (Mr. Newlands, Id., pp. 12866, 12867.)

"We will have a commission which will aid the courts where they are at present faulty in the administrative processes that are necessary to destroy these consolidations, and to destroy these monopolies, and to aid both the courts and the Attorney General in the administration of the law. Instead of regulating monopoly we are regulating unfair competition.

"We are not taking these monopolies under the tutelage and the guardianship of this commission. On the contrary, this commission is organized to destroy them. It is so organized as not only to aid the courts and the Attorney General, but it will impair and destroy monopoly in the future in the embryo, for the monopolies of the future are not to be created by enormous consolidations. * * * but it is possible through unfair methods of competition, with an entirely legal organization, to resort to these devices which the law has in repeated decisions condemned and by which it would be possible to build up the monopolies of the future just as effectively, though differing in character, as those at present organized." (Mr. Newlands. Id., p. 12867.)

"The unfair competition that is sought to be

reached * * * is that violence of competition conducted through unfair practices and methods which must ultimately result in the extinction of the rival and the establishment of a monopoly." (Mr. Cummins, Id., p. 11103.)

"The trade commission is as much bound to obey the law as is any court which is established to administer justice. The trade commission becomes bound to declare what is or what is not unfair competition according to the law of the land," etc. (Mr. Cummins, Id., p. 11104.)

"We have chosen to report a rule for the trade commission in the language which has been suggested, namely, 'unfair competition.' It is that competition which is resorted to for the purpose of destroying competition, of eliminating a competitor, and of introducing monopoly. That is the 'unfair competition,' in its broad sense, which this bill endeavors to prevent." (Mr. Cummins, Id., p. 11104.)

"And the attempt is to go further and make some things offenses that are not now condemned by the anti-trust laws. That is the only purpose of section 5, to make some things punishable, to prevent some things that cannot be punished or prevented under the anti-trust law." (Mr. Cummins, Id., p. 11236.)

"Assuming that * * * the Sherman law * * * is intended to preserve competition, and I believe it is, the section in this bill relating to unfair competition will, in my judgment, be a readier instrumentality for the maintenance of competition than the anti-trust law itself. The only unfair competition that the section will ever touch is that competition which has for its object the destruction of competition. There is no unfair competition that is consistent with the endurance of any competition. * * * Unfair practices in competition have been denounced (by the Supreme Court) oftener as violations of the anti-trust law than any other phase of industrial combination. * * * Unfair competition means the extinction

of competition. The anti-trust law has for its object the preservation of fair, full competition; and in order to preserve fair competition unfair competition must cease to exist. The two cannot survive in the same industrial field or as they are related to the same commodity and commerce." (Mr. Cummins, Id., p. 11285.)

"* * * this proposed statute is intended to gather up the lesser instances which the anti-trust law cannot and does not reach, and to prevent the beginning of the attempt to monopolize, the beginning of the insiduous efforts toward the restraint of trade and commerce." (Mr. Cummins, Id., p. 11455).

"Mr. President, it is frequently asked—it has been asked here—why, if unfair competition is in restraint of trade, we are attempting to add statute to statute and give a further remedy for the violation of the law of 1890? It is a confusion in terms, Mr. President, only; there is no confusion in thought, I am sure, by those who have used this argument. There may be unfair competition which does not constitute restraint of trade. Unfair competition must usually proceed to great lengths and be destructive of competition before it can be seized and denounced by the anti-trust law. In other cases it must be associated with, coupled with, other vicious and unlawful practices in order to bring the person or the corporation guilty of the practice within the scope of the anti-trust law. The purpose of this bill in this section and in other sections, which I hope will be added to it, is to seize the offender before his ravages have gone to the length necessary in order to bring him within the law that we already have. We knew little of these things in 1890 * * * and as we have gone on under the anti-trust law and under the decisions of the courts in their efforts to enforce that law, we have observed certain forms of industrial activity which ought to be prohibited whether in and of themselves they restrain trade or commerce or not. We have discovered that

their tendency is evil; we have discovered that the end which is inevitably reached through these methods is an end which is destructive of free commerce among the states. It is these considerations which, in my judgment, have made it wise, if not necessary, to supplement the anti-trust law by additional legislation, not in antagonism to the anti-trust law, but in harmony with the anti-trust law, to more effectually put into the industrial life of America the principle of the anti-trust law, which is fair, reasonable competition, independence to the individual and dissociation among corporations." (Mr. Cummins, Id., p. 11455.)

"We propose to make it unlawful for any corporation, or any person, indeed, to practice unfair competition, and whenever the practice of unfair competition has not reached a point that constitutes a voliation of the anti-trust law, then we intend to do what we can to maintain fair, full, free competition through the intervention of the trade commission." (Mr. Cummins, Id., p. 11529.)

"There are, however, certain forms of activiity, certain forms of combination, certain relations that do exist and have existed in business, which tend toward the suppression of competition, which, if allowed to grow and develop, become a menace to the welfare and freedom of trade, which are not malum in se but malum prohibitum, or ought to be malum prohibitum; and the law relating to the regulation of these things, in my judgment, should be submitted to a commission or other tribunal for administration and enforcement." (Mr. Cummins, Id., p. 11539.)

"* * * we have concluded to go further and to reach practices which, whilst perhaps they might be incidently reached through the administration of the Sherman anti-trust law, could not always be reached. These practices constitute the very germ of monopolies. They are the monopolies in embryo." (Mr. Cummins, Id., p. 12623.)

"Unfair competition is the antithesis or the opposite of free, fair competition. It is that con-

dition which we desire to preserve. It is that condition which, in my opinion, this bill will help to establish and preserve. Unfair competition may not always tend toward monopoly, but unfair competition always destroys the effect of fair competition. * * * I do, however, want a commission that will supervise a certain part of the enforcement or administration of the law which is intended to prevent monopoly from coming into existence at all." (Mr. Cummins, Id., p. 12733.)

"I have not heard it questioned during this debate that we ought to make unfair competition unlawful in order to preserve in full strength and vigor the force which we all desire to preserve, namely, full, free and fair competition in the business of the United States." (Mr. Cummins, Id., p. 12916.)

"Unfair competition is the antithesis of fair, free competition. Unfair competition is the pursuit of that practice which destroys competition and establishes monopoly. Unfair competition is the deadliest enemy of independence in business." (Mr. Cummins, Id., p. 12919.)

"Now, as to the evil to be corrected through the action of the commission under section 5. The numerous cases which have been decided under the Sherman Act have established beyond doubt that the only effective means of building up and maintaining monopoly, where there is no control of a natural resource or of transportation, is the use of unfair competition. Fair competition is competition which is successful through superior efficiency. Competition is unfair when it resorts to methods which shut out competitors who, by reason of their efficiency, might otherwise be able to continue in business and prosper. Without the use of unfair methods no corporation can grow beyond the limits imposed upon it by the necessity of being as efficient as any competitor. The mere size of a corporation which maintains its position solely through superior efficiency is ordinarily no menace to the public interest. The object of sec-

tion 5 is to prevent the creation or continuance of monopoly through unfair methods. * * * The Sherman Anti-trust Act does not become effective until a monopoly is full grown, in full monopoly, so that you can prove to the court that it is a monopoly and is in restraint of trade; but if the proposed trade commission has its attention called to some unfair method of competition, and if it decides that it is unfair competition and may lead to monopoly or restraint of trade, it may prohibit it; and then the court will come in and put that prohibition into effect. It may be argued that the Sherman Act sufficiently protects the public in this regard. This is not true, for the following reasons: The Sherman Act applies only to restraint of trade by a combination and to monopolization of commerce. Unfair competition is a means of restraining or of monopolizing trade. But there may be some doubt as to whether the mere use of an unfair method, without more, by a corporation of no conspicuous size, would be held to fall within the scope of the Sherman Act. At all events, the Department of Justice, with it manifold other activities has not in the past brought suit under the Sherman Act, and probably will not do so, except in cases of great magnitude involving what appear to be very clear violation of the act. In such suits the Attorney General usually alleges the use of unfair competition practices in support of his main contention that a monopoly exists which ought to be dissolved. The injunction against the future use of such practices is only an incidental part of the decree. Countless competitors succumb before relief is finally obtained. The Department of Justice deals with monopoly as an accomplished fact. * * * Instead of merely terminating an illegal condition after harm has been done, the trade commission will prevent not only the infliction of harm but also the monopoly to which that harm would have led. * * * So that the Sherman Anti-trust Act or any act that prohibits restraint of trade or abolishes monopoly may come in too late, after all

the other competitors have been killed off, and when, if you drive the trust out of the state, you cannot get any goods. The pending bill is aimed to nip those practices (i. e., unfair competitive practices) in the bud, * * * it is done to preserve the lives of the small competitors, so that when you have got all the monopoly out of the way the little fellows are there to do business. * * * It (i. e., the Department of Justice) will be able to give its main attention to the great task of prosecuting suits for the dissolution of monopolies, leaving to the trade commission the important service of policing competition, so as to protect small business men, keep an open field for new enterprises and prevent the development of trusts. * * * The regulation of competition means the prevention of competition that destroys for the purpose of gaining monopoly, and so is harmful to the public—the prevention, in short, of unfair competition. The Sherman Act is adequate for the abolition of monopoly; it is, however, but imperfectly adequate for the regulation of competition. The present Congress is charged with the duty of supplying the defect in the law." (Mr. Hollis, Id., p. 12146.)

"Unfair competition is the most effective weapon of monopoly. Prevention of unfair competition * * * will liberate business. Fair, free and open competition is the object which the Sherman Act, no less than this bill, seeks to promote. The two laws will be in perfect harmony." (Mr. Hollis, Id., p. 12149.)

"They (i. e., pending trust bills) are merely additional and supplemental acts to the already existing laws on these subjects. They are intended not to regulate monopoly, but to prohibit it, and to prohibit those practices which will lead to and encourage it." (Mr. Hollis, Id., p. 12732.)

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In The

Supreme Court of the United States

October Term, 1921.

FEDERAL TRADE COMMISSION,
Petitioner,

v.

BEECH-NUT PACKING COMPANY, a corporation,
Respondent.

No. 47.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

SUPPLEMENTAL BRIEF FOR BEECH-NUT PACKING COMPANY, RESPONDENT.

CHARLES WESLEY DUNN,
Counsel for Respondent.

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On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

SUPPLEMENTAL BRIEF FOR BEECH-NUT PACKING COMPANY, RESPONDENT.

Statement.

In view of the extended period intervening between the filing of Respondent's brief and the oral argument of this cause, during which the Court has decided the important case of *Frey & Son* v. *The Cudahy Packing Co.*, 255 U. S. , and the Commission has filed a revised brief, it seems both necessary and convenient concisely to summarize,* in a supplemental brief, Re-

*See, also, pages 1-7 of Respondent's main brief.

spondent's argument in its main brief in the light of the *confirmation* of that case. Petitioner's original brief is analyzed and answered on pages 118-163 of Respondent's main brief.

The formal question presented by this writ of certiorari is whether the United States Circuit Court of Appeals for the Second Circuit Court erred in setting aside the Order to Cease and Desist issued by the Federal Trade Commission against the Beech-Nut Packing Company under Section 5 of the Act of September 26, 1914 (38 Stat., 717, c. 311), entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," commonly known as the *Federal Trade Commission Act.* The Circuit Court of Appeals reversed and set aside the Order of the Commission upon the ground that the conclusion of the Commission that the refusal-to-sell conduct in issue involves the use of unfair methods of competition in violation of Section 5 cannot be sustained in the face of the decision by this Court in the *Colgate* case (250 U. S. 300) that a similar conduct "constitutes merely the exercise of a man's right to do what he will with his own and is not obnoxious to the Sherman Act." (Rec., p. 49.) (*Beech-Nut Packing Company* v. *Federal Trade Commission,* 264 Fed. 885, 889.)

The Beech-Nut Packing Company respectfully submits that the Order in issue is wholly void because of want of authority and power to make it and therefore must be set aside, since (1) it is based upon a Complaint plainly insufficient, when construed in the light of the unquestioned facts, to charge the use of unfair methods of competition within the meaning and prohibition of Section 5; (2) it is based upon methods of competition, set forth in the supported Findings to the Facts,

which cannot be reasonably held legally unfair within the meaning and prohibition of Section 5, because both substantially detrimental to the interest of the public, in general, and unfairly injurious to the Company's competitors, in particular, upon the grounds formally declared by the Commission in the Complaint and Findings, when such methods are examined in the light of the great remedial purpose contemplated by the Act and are tested by the principles of law hitherto settled by the adjudged cases; (3) it is essentially designed and effective, if enforced, to deprive the Company of its fundamental right freely to refuse to sell its own products to dealers who are not desired by it as customers, in pursuance of its own individual discretion independently exercised in the normal course of its own private business and individual trade without any unlawful purpose. And it is unnecessary to observe that any doubt with respect to either the meaning or authority of the Order must be resolved in favor of the Company. The Beech-Nut Packing Company respectfully submits, further, that Section 5 cannot, consistently with the Due Process Clause of the Fifth Amendment to the Constitution of the United States, be construed and applied to deprive it of its fundamental right so to refuse to sell. Hence, the judgment of the Circuit Court of Appeals should be affirmed.

I.

In the absence of any purpose either opposed to good morals because characterized by fraud, deception, misrepresentation, bad faith, intimidation, oppression, or some other such wrongful element, or against public policy because involving the introduction or pursuit of unlawful monopoly, undue restraint of trade in products sold, or conduct otherwise prohibited by law, Section 5 of the Federal Trade Commission Act does not deprive a manufacturer or trader, engaged in an entirely private business and independently exercising his own individual discretion in the normal course of his own individual trade, of his fundamental right freely to select his own customers, freely to sell or to refuse to sell his lawfully owned and possessed property or not, as he pleases, to whom he pleases, for any reason he pleases, or for no reason if he so pleases. And, of course, he may announce in advance that he will do what he has the lawful right to do.

Section 5 declares that unfair methods of competition in interstate commerce are unlawful and empowers and directs the Federal Trade Commission to prevent their use, "if it shall appear to the Commision that a proceeding by it in respect thereof would be to the interest of the public." The words "unfair methods of competition," as so used, are not defined. It is for the Courts, not the Commission, ultimately to determine their true meaning and application, in law. (*Federal Trade Commission* v. *Gratz et al.*, 253 U. S. 421, 427.) Manifestly, they must be construed in the light of reason, the public policy which the Act embodies, and the principles of law hitherto settled by the adjudged cases. It is plain upon the very face of Section 5 that it outlaws, not competition, but *unfair methods* of competi-

tion, that the Commission is empowered and directed to prevent the use of those methods of competition alone which, when examined in the light of the great remedial purpose contemplated by the Act and tested by the established principles of law, may be reasonably held legally unfair, either inherently or by reason of the purpose or circumstances or both, of their use, because substantially detrimental to the interest of the public, in general, and unfairly injurious to competitors of the user, in particular. If the methods of competition either set forth in the Complaint or established by the duly supported Findings cannot be reasonably held legally unfair, when so examined and tested, because detrimental to the interest of the public, in general, and unfairly injurious to the competitors of the user, in particular, *upon the grounds formally declared and duly supported in fact*, then the Order is wholly void for want of authority and power to make it and therefore must be set aside. And it cannot be doubted that, whatever may be the methods* of competition which are unfair within the meaning and prohibition of Section 5, that section cannot be reasonably construed to deprive a manufacturer or trader, engaged in an entirely private busniess and independently exercising his own individual discretion in the normal course of his own individual trade without any unlawfully purpose, of his fundamental right freely to select his own customers, freely to sell or to refuse to sell his lawfully owned and possessed property or not, as he pleases, to whom he pleases, for any reason he pleases, or for no reason if he

*The conception of the meaning of the terms "unfair methods of competition" and "unfair competition" prevailing at common law and in the law of the country prior to the enactment of the Federal Trade Commission Act is clearly defined on pages 72-73, 77-79 of Respondent's main brief, to which the attention of the Court is respectfully directed.

so pleases, since the Federal Trade Commission Act was expressly enacted to supplement the Sherman Act, and thus more completely and effectually to preserve and protect the fundamental right of freedom to trade existing at common law, and therefore does not impair or destroy it. And, of course, he may announce in advance that he will do what he has the lawful right to do. (*United States* v. *Colgate & Co.*, 250 U. S. 300, and cases cited; *United States* v. *A. Schrader's Son, Inc.*, 252 U. S. 85; *Federal Trade Commission* v. *Gratz et al.*, *supra*; *Frey & Son* v. *The Cudahy Packing Company*, 255 U. S. .) By "unlawful purpose" we mean a purpose that is either opposed to good morals because characterized by fraud, deception, misrepresentation, bad faith, intimidation, oppression, or some other such wrongful element, or against public policy because involving the introduction or pursuit of unlawful monopoly, undue restraint of trade in products sold, or conduct otherwise prohibited by law. It is too plain for argument that the right of freedom to trade cannot be preserved and protected by invalidating and prohibiting its mere independent exercise without any unlawful purpose; that such exertion of the very right which it is the public policy, expressed and enforced by the antitrust acts, to preserve and safeguard, cannot be reasonably held either detrimental to the interest of the public, in general, or unfairly injurious to competitors, in particular. As the Court, speaking through Mr. Justice McReynolds, said in the *Gratz* case (*supra*, pp. 427-428, 429), notable for the reason that it is the first case arising under Section 5 to be decided by this Court:

> "The words 'unfair methods of competition' are not defined by the statute and their exact meaning is in dispute. It is for the courts, not

> the commission, ultimately to determine as matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. The act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade. • • •
>
> "All question of monopoly or combination being out of the way, a private merchant, acting with entire good faith, may properly refuse to sell except in conjunction, such closely associated articles as ties and bagging. If real competition is to continue, the right of the individual to exercise reasonable discretion in respect of his own business methods must be preserved. *United States* v. *Colgate & Co.*, 250 U. S. 300; *United States* v. *A. Schrader's Son, Inc.*, 252 U. S. 85."

Under the common law, a private manufacturer or trader has the unquestioned right freely to exercise his own independent discretion in the selection of his own customers, in the absence of an unlawful purpose. (*Mogul Steamship Co.* v. *McGregor, Gow, & Co.*, 23 Q. B. D. 598, 614; *Standard Oil Co.* v. *United States*, 221 U. S. 1, 56; *United States* v. *Colgate & Co., supra*, and cases cited; *Federal Trade Commission* v. *Gratz et al., supra.*) And, as the Court said in the *Colgate* case (supra, p. 307):

> "In the absence of any purpose to create or maintain a monopoly, the (Sherman) Act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell."

This is so because, as the Court pointed out (id.):

> "The purpose of the Sherman Act is to prohibit monopoly, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce—in a word to preserve the right of freedom to trade."

The Clayton Act (38 Stat., 730), entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," and the Federal Trade Commission Act (38 Stat., 717), entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," were simultaneously considered by Congress and compose a single and harmonious legislative program enacted in pursuance of a common purpose. A review of the genesis and history of their enactment and an examination of their terms conclusively establish that the great remedial purpose contemplated by Congress was this: to supplement and strengthen the Sherman Act, to make the policy, principle and enforcement of that Act more effectual. In short, Congress thereby plainly and unmistakably purposed to enforse a more complete and certain realization and enjoyment by all of the fundamental right of freedom to trade, existing at common law, which right was established as the law of the land by the Sherman Act, and thus more securely to preserve, maintain and protect freedom of trade and competition from the evil and destructive economic forces of undue restraint of trade and private monopoly. The Clayton Act, *inter alia*, outlaws certain and defined methods of competition where their effect may be to substantially lessen competition or tend to create a monopoly in any line of commerce, methods notorious because heretofore unfairly used with

that detrimental effect. The Federal Trade Commission Act (Section 5), on the other hand, is fundamentally designed broadly to prevent the use of the means whereby, as experience in the enforcement of the Sherman Act has demonstrated, unlawful restraint of trade and monopoly are most effectively created and maintained, in the absence of control either of a natural resource or of transportation, viz., *unfair methods of competition*, and thus to stop unlawful restraint of trade and monopoly at the threshold, to nip them in the bud, so to speak. It is self-evident that fair competition is essential to the preservation of freedom of trade and competition. The Sherman, Trade Commission and Clayton Acts, popularly known as "the antitrust laws," may be said to compose the *Constitution of Freedom of American Business.* The Sherman Act commands business to complete and compels free competition. The Trade Commission (Section 5) and Clayton Acts command business to compete fairly and compel that fair competiton wthout which there cannot be free competition.

The Clayton Act expressly recognizes and affirms the right of a private manufacturer or trader freely to exercise his own independent discretion in selecting his own customers in *bona fide* transactions and not in restraint of trade. Section 2, defining and prohibiting unlawful discrimination in price between purchasers, concludes: "And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in *bona fide* transactions and not in restraint of trade." While the companion Trade Commission Act (Section 5) does not contain a similar reservation, the omission is wholly without significance since it is too plain for argument that that Act cannot be reasonably construed to invalidate the mere independ-

ent exercise, without any unlawful purpose, of the very right of freedom to trade which it was expressly enacted more completely and effectually to preserve and protect. To construe Section 5 as impairing or destroying that right, as enslaving rather than freeing business, is manifestly nothing less than a gross misconception and misapplication of it. No standard or principle of statutory construction authorizes and justifies a construction of Section 5 that is subversive of its fundamental purpose, does violence to its plain language and import, and is repugnant to reason and common sense. There is always the duty to interpret that section—the duty arising from the general character of the language employed—so that the words "unfair methods of competition" shall be given a meaning which will not destroy the individual right of freedom to trade. Section 5 is not to be caused to be at war with itself by annihilating the very right which, on its face, it was designed to preserve. Moreover, Section 11 of the Federal Trade Commission Act provides, in part, as follows: " * * * nor shall anything contained in the Act be construed to alter, modify or repeal the said Antitrust Acts * * * or any part or parts thereof." Section 4 defines the term "anti-trust acts" to include the Sherman Act. Both the plain language of the Act and the history of its enactment clearly establish that the purpose of Congress in so deliberately limiting the application and enforcement of Section 5 was two-fold. That is, Congress thereby intended to make certain, beforehand, that Section 5 should not be construed and enforced either (a) to qualify the broad prohibition against restraint of trade and monopoly contained in, or to interfere in any way with the enforcement of, the Sherman Act, or (b) to restrict or destroy the fundamental right of freedom to trade, existing at common law, which is preserved and estab-

lished as the law of the land by the Sherman Act. The authority of the Federal Trade Commission cannot transcend the statute creating it and defining its powers and duties. The Commission cannot be reasonably held empowered by the statute to prohibit the mere independent exercise, without any unlawful purpose, of the very right it was created to sustain, and thus arbitrarily to substitute its will in place of the law of the land.

As a result of the prior decisions of this Court the following additional principles of law are now indisputable:—

(1) The owner of movables cannot, consistently with the prohibitions against restraint of trade and monopoly contained in the Sherman Act, sell them and lawfully by contract or agreement fix a price at which they shall afterwards be sold, because, as the Court speaking through Mr. Chief Justice White, observed in the *Boston Store case* (246 U. S. 8, 21-22), "to do so would be at one and the same time to sell and retain, to part with and yet to hold, to project the will of the seller so as to cause it to control the movable parted with when it was not subject to his will because owned by another, and thus to make the will of the seller unwarrantedly take the place of the law of the land as to such movables." Such price-fixing contracts or agreements involve an undue restraint of trade in movables sold and are unlawful both at common law and under the Sherman Act. They create, in effect, a combination between seller and buyers for the prohibited purposes. (*Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373.) And such unlawful agreements may be either "express or implied from a course of dealing or other circumstances." (*United States* v. *A. Schrader's Son, Inc.*, *supra*, p. 99; *Frey & Son* v. *The Cudahy Packing Co.*, *supra*, p. .) Their

vice, the undue and unlawful restraint of trade, is the restraint thereby imposed upon the right of buyers freely to sell the property owned by them, a limitation as to price for the future which is plainly hostile to their title and the right of alienation incident to it. As the Court said in the *Colgate case* (*supra*, pp. 307-308): "In *Dr. Miles Medical Co.* v. *Park & Sons Co., supra,* the unlaw- combination was effected through contracts which undertook to prevent dealers from freely exercising the right to sell." In short, under the general law the owner of movables cannot grant the title thereto by sale for a full price satisfactory to him and yet lawfully retain the incidents of it. (*United States* v. *United States Machinery Co.*, 247 U. S. 32, 58.) We direct attention to the fact that in the *Miles* case the Court fully recognized the right of a manufacturer freely to sell or not, as he pleases, in the independent exercise of his own individual discretion without any unlawful purpose. It was said (pp. 403, 404): "Moreover, every manufacturer, before sale, controls the articles he makes. With respect to these, he has the rights of ownership * * * But because a manufacturer is not bound to make or sell, it does not follow that in case of sales actually made he may impose upon purchasers every sort of restriction." That is, the decision was that while the manufacturer has this complete right, prior to sale, he cannot, in case and after he has exercised and exhausted his right to sell, whereby the movable has passed into the channels of trade and is owned by another qualify the title and limit the right of the purchaser freely to sell, through a restrictive agreement. It was a restraint actually imposed upon the right of freedom of alienation of movables sold, and not the right of the owner of movables freely to refuse to sell, that was involved and condemned.

(2) But, the Sherman Act does not deprive a manufacturer, engaged in an entirely private business and independently exercising his own individual discretion without any purpose to create or maintain a monopoly, of the right freely to announce that he will refuse to sell, and subsequently freely to refuse to sell, his own products to dealers who are not desired by him as customers for the reason that they do not charge resale prices suggested by him, since he is thereby merely independently asserting, without any unlawful purpose, his fundamental common law right of freedom to trade which that Act was enacted to preserve. (*United States* v. *Colgate & Co., supra.*) The purpose of the Sherman Act," said the Court in that case (p. 307), "is * * * to preserve the right of freedom to trade. In the absence of any purpose to creat or maintain a monopoly, the Act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell." Neither an unlawful combination, nor an unlawful conspiracy, nor an unlawful agreement or agreements, nor an unlawful restraint of trade in products sold, within the meaning of the Sherman Act, may be legally implied from such refusal-to-sell conduct, either as to purpose or effect. (*United States* v. *Colgate & Co., supra; United States* v. *A. Schrader's Son, Inc., supra; Frey & Son* v. *The Cudahy Packing Co., supra.*) And it in no way derogates from the inherently lawful character of that conduct to say that dealers selling at the suggested prices thereby "cooperate," so-called, in it, to describe such sales conduct by the dealers as "cooperation." (*Frey & Son* v. *The Cudahy Packing Co., supra.*) In that case the

Court, speaking through Mr. Justice McReynolds, said (p.):

> "Among other things the trial court charged:
>
> 'I can only say to you that if you shall find that the defendant indicated a sales plan to the wholesalers and jobbers, which plan fixed the price below which the wholesalers and jobbers were not to sell to retailers, and you find defendant called this particular feature of this plan to their attention on very many different occasions, and you find the great majority of them not only expressing no dissent from such plan, but actually cooperating in carrying it out by themselves selling at the prices named, you may reasonably find from such fact that there was an agreement or combination forbidden by the Sherman Anti-Trust Act.'
>
> The recited facts, standing alone, (there were other pregnant ones), did not suffice to establish an agreement or combination forbidden by the Sherman Act. This we pointed out in *United States* v. *Colgate & Co.*"

Consequently, it is idle to say that there is no substantial difference, in fact, and hence in law, between the refusal-to-sell conduct upheld in the *Colgate* case and the system of resale-price-fixing agrements condemned in the *Miles* case. As the Court said in the *Schrader* case (*supra*, pp. 99-100):

> "It seems unnecessary to dwell upon the obvious difference between the situation presented when a manufacturer merely indicates his wishes concerning prices and declines further dealings with all who fail to observe them, and one where he enters into agreements—whether express or implied from a course of dealing or other circumstances—with all customers throughout the different States which undertake to bind them to ob-

serve fixed resale prices. In the first, the manufacturer but exercises his independent discretion concerning his customer and there is no contract or combination which imposes any limitation on the purchaser. In the second, the parties are combined through restrictive agreements designed to take away dealers' control of their own affairs and thereby destroy competition and restrain the free and natural flow of trade amongst the States."

II.

Inasmuch as the essential conduct here in issue is merely the announcement by the Beech-Nut Packing Company that it will refuse to sell, and its subsequent refusal to sell, its own products to dealers who are not desired by it as customers for a declared reason, effected solely in the normal course of its own private business and individual trade, sólely in pursuance of its own individual discretion independently exercised, and always without any such unlawful purpose, it follows that Section 5 does not deprive the Company of its fundamental right to effect such refusal-to-sell conduct.

All the facts in issue are recited in the Agreed Statement of Facts (Rec., pp. 29-35), substituted in lieu of testimony. The Findings as to the Facts (pp. 35-43) embody a verbatim copy of the Agreed Statement of Facts, with the exception of the modification, by omission, of one paragraph (Five, p. 37) and the addition of four new paragraphs (Six, Fourteen, Fifteen and Sixteen, pp. 37, 42-43) purporting to define the alleged unlawful purpose and effect of the conduct previously described. We respectfully submit, however, and later establish, that the so-called "findings as to the facts" contained in such additional paragraphs cannot be held conclusive, because they are not supported by the Agreed Statement, are directly contradicted by the other and true findings, and are composed of inferences and conclusions which are wholly without justification either in fact or law. There is no dispute, therefore, with respect to the merchandising conduct actually in issue. As defined in the Agreed Statement and Findings it is, in full detail, this:

The Beech-Nut Packing Company, a corporation, is

engaged in an entirely private and strictly competitive manufacturing business, producing divers food products (including sliced bacon and beef, conserves, condiments and peanut butter), candies and chewing gum, and selling such products to wholesale dealers, principally, throughout the United States, confining its sales at all times to dealers who are either known or believed by it to be desirable and satisfactory customers in all respects. (Rec., pp. 29-30, 36-37). In merchandising its products the Company has adopted a policy, known as the "Beech-Nut Policy" (pp. 30, 37), in pursuance of which it effects the following *basic* conduct, always dealing with each customer separately (*id.*), to-wit (pp. 31-32, 38): *It suggests* to dealers resale prices for Beech-Nut products, announces that it will refuse to sell its products to dealers, and subsequently does refuse to sell its products to practically† all dealers, who either do not charge the suggested prices or resell to other dealerse who do not charge such prices.* Incidental to such refusal-to-sell conduct, the Company (a) *refuses to sell its products to practically all mail-order houses,* for the reason that they frequently sell at cut prices, and to practically all dealers who resell its products to such houses (*id*); (b) *refuses to accept orders from retailers* where they are to be filled through wholesalers who either do not charge the suggested prices or resell to other dealers who do not charge such prices, *requesting*‡ the retailers to name other wholesalers who are acceptable to it as customers (pp. 32, 38-39); (c) *requests* dealers to charge the *suggested* prices and not to sell to other dealers who do not charge such prices and "to co-

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*Not *fixes.*
†Not *all.*
‡It is not stated whether the retailers comply with this *request.*

operate",* so-called, by so doing (pp. 30-31, 37-38); (d) *urges* dealers to take the profit thus suggested (pp. 35, 42); (e) *requests* dealers to report to it the names of price cutters (pp. 34, 40-41); (f) *investigates and ascertains the identity of dealers* who either do not charge the suggested prices, or resell to other dealers who do not charge such prices, through the medium of key numbers or symbols† stamped or marked upon the shipping cases, which numbers or symbols are devised and used by the Company subsequently to ascertain the identity of either a product or its distributors, *for any reason whatever* (pp. 32-33, 39); (g) *keeps a card record,‡ at its factory, of the names of both its customers and dealers who are not desired by it as customers for any reason,* including the reason that they either do not charge the suggested prices or resell to other dealers who do not charge such prices, *and announces to its own salesmen and customers,* upon occasion, the fact of such undesirability (pp. 33, 39-40); (h) *reinstates as customers dealers to whom it has previously refused to sell* its products for the particular reason above stated, upon the basis of an expres-

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*There is no charge or finding by the Commission that the conduct in issue involves an unlawful combination, either in purpose or effect. The "co-operation" of dealers, so-called, consists merely of their selling at the suggested prices and not selling to dealers who do not charge such prices, in pursuance of the basic refusal-to-sell conduct above defined.

†The use of such identification numbers or symbols by manufacturers of packaged foods and confections is a universal and necessary practice, without which they would be unable, for example, to detect the cause of either spoilage of product or failure of container, to prevent excessive and deteriorating storage, etc., during distribution. Such numbers and symbols are not devised and used by the Company solely to identify the dealers referred to.

‡This record is kept exclusively for the Company's own reference and guidance in the conduct of its own business and is used exclusively by its own officers and employees for and in pursuance of that purpose. Such a record of desirable and undesirable customers constitutes a universal and necessary business practice.

sion¶ by them which satisfies it that they will thereafter charge the suggested prices and not sell to other dealers who do not charge such prices, *and notifies its own salesmen and customers* that such dealers are now acceptable to it as customers (pp. 32-33, 39-40); (i) *adds as new customers* dealers reported by its salesmen as declaring¶ that they intend to and will charge the prices suggested by it and not sell to other dealers who do not charge such prices (pp. 32, 39). On the other hand, wholesale dealers (a) have reported to the Company instances of local price cutting, specifying, in many cases, the names of the price cutters, and have requested the Company to refuse to sell its products either to such price cutters or to dealers who resell to them (pp. 34, 40); (b) have stated in letters written by them to the Company that they will "support"* the Company and "co-operate"* with it in its refusal-to-sell policy, that they "prefer" to deal with the Company and will push its products because the Company so refuses to sell such products either to price cutters or to dealers who resell to them (pp. 33, 40); (c) generally, "prefer" to handle and push Beech-Nut products, because of the Company's refusal-to-sell policy, rather than the products of competing manufacturers who do not pursue such a policy (pp. 33-34, 40). Both the Agreed Statement of Facts and the Findings as to the Facts conclude with this definitive declaration (pp. 35, 43):

¶There is no charge or finding by the Commission that the conduct in issue either involves or results in agreements, whether expressed or implied, between the Company and its dealer customers. On the contrary, the Commission, upon its own motion, amended the Complaint to strike out the entire charge of such agreements, originally contained therein, and formally admits and finds that such conduct does not involve contracts whereby resale prices are fixed, maintained and enforced. This cause does not present the question of either the existence or validity of a combination, or a conspiracy or agreements unduly to restrain trade, whether express or implied, as later fully shown.

*See footnote on "cooperate," *ante*.

"That the merchandising conduct of respondent, heretofore defined and as herein involved, does not constitute a contract or contracts whereby resale prices are fixed, maintained, and enforced". This is the whole conduct in issue.

We have next to define the conduct actually set forth and challenged in the amended Complaint (Rec., pp. 27-28). Stripped of all characterization and inferences and conclusions of both fact and law and reduced to a concise and accurate statement of fact in harmony with the formal findings as to the facts, above summarized, such conduct is, in substance, this: The Company (a) *suggests*† *to dealers resale prices for Beech-Nut Products, announces that it will refuse to sell, and subsequently does refuse to sell, its products to dealers who either do not charge the suggested prices or resell to other dealers who do not charge such prices;* (b) *refuses to accept orders from retailers* where they are to be filled through wholesalers who either do not charge the suggested prices or resell to other dealers who do not charge such prices, *requesting*• the retailers to name other wholesalers who are acceptable to it as customers; (c) *requests* dealers to report to it the names of price cutters; (d) *keeps a card record,*¶ *at its factory, of the names of all dealers who are not desired by it as customers* for the reason that they either do not charge the suggested prices or resell to other dealers who do not charge such prices, *and refuses to sell its products to such dealers* until it has received from them an expression‡ to the effect that in the future they intend to and will charge the suggested prices and not sell to other dealers who do not charge such prices.

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†See footnote on "suggests," *ante.*
•See footnote on "requesting," *ante.*
¶See footnote on "card record" *ante*
‡See footnote on "expression," *ante.*

Hence, it is manifest and indisputable upon the very face of the Amended Complaint, Agreed Statement of Facts, and Findings as to the Facts that the essence of the conduct in issue is precisely and simply this: *The announcement by the Beech-Nut Packing Company that it will refuse to sell, and the subsequent refusal by the Company to sell, its own products to dealers who are not desired by it as customers for the reason that they either do not charge the prices for Beech-Nut products suggested by it or resell to other dealers who do not charge such prices.* It cannot be doubted that the merchandising policy here presented finally boils down to that refusal-to-sell conduct, since all the acts recited either directly involve or are wholly and essentially incidental to it. Moreover, the terms of the Order—which must be strictly construed in the light of the duly established facts upon which it rests—plainly confirm the conclusion that such refusal-to-sell conduct is the fundamental conduct here sought to be outlawed and prohibited under Section 5, is the basic conduct upon the validity of which the decision in this cause ultimately turns. And it must be presumed that the particular acts therein specifically enumerated as the means principally used to effect the offense charged and thereby expressly forbidden, constitute, in the judgment of the Commission, the essence and substance of the conduct in issue. It is ordered (Rec., p. 44) that the Company cease and desist from—

> "1. Refusing to sell to any such distributors because of their failure to adhere to any such system of resale prices." The meaning of this

order, construed in the light of the unquestioned facts, is unmistakable. It is, in fact and practice, plainly designed and effective, if enforced, to deprive the Company of the right to refuse to sell its own products to dealers who are not desired by it as customers for the reason that they do not charge the prices for Beech-Nut products suggested by it.

"2. Refusing to sell to any such distributors because of their having resold respondent's said products to other distributors who have failed to adhere to any such system of resale prices." Again the meaning of the order, so construed, is unmistakable. It is, in fact and practice, plainly designed and effective, if enforced, to deprive the Company of the right to refuse to sell its own products to dealers who are likewise not desired by it as customers for the reason that they resell to other dealers who do not charge the suggested prices.

"3. Securing or seeking to secure the cooperation of its distributors in maintaining or enforcing any of such system of resale prices." Referring to the Agreed Statement and Findings, as we must, to ascertain the true meaning and application, in fact, of the broad term "cooperation," as so loosely used, we find that it essentially means and applies to merely the refusal-to-sell conduct forbidden in the two preceding paragraphs. The "cooperation", so-called, is, in fact, no more than the charging of the suggested prices by dealers and their failure to resell to other dealers who do not charge such prices under and in pursuance of the circumstances alone defined in the preceding paragraphs.*

*It must always be borne in mind, as previously stated and later shown, that there is no charge or finding by the Commission, in the record in this cause, that such refusal-to-sell conduct involves, either in purpose or effect, an unlawful combination, or an unlawful conspiracy, or unlawful agreements, whether express or implied, unduly to restrain trade in products sold.

> "4. Carrying out or causing others to carry out a resale price maintenance policy by any other means." It is clear that this catch-all order cannot, in application, transcend the limitations of the conduct actually in issue, since the Commission is authorized by the Act to prevent the use of those methods of competition alone which, upon formal proceeding, are duly established in fact and are, in its opinion, prohibited by the Act. Consequently, the conduct so sweepingly forbidden cannot be other than that in issue. And its essence is the refusal-to-sell conduct hitherto defined, as the first two paragraphs of the Order conclusively establish.

Further confirmation is found in the Commission's brief† wherein it characterizes (p. 71) the merchandising policy in issue as "respondents refusal-to-sell policy"—we may parenthetically add that it has been so characterized by both the Commission and the Company from the inception of this proceeding and is so popularly known in the trade,—declares (p. 47) that the chief value of such policy is "the power to threaten" to refuse to sell, which power "is the sword of Damocles over the head of every distributor," and states (p. 60) in effect, that the question in issue is whether the Company has thereby used its ordinary right to select its own customers in order to accomplish an illegal end; also in the fact that, as hitherto noted, the Circuit Court of Appeals unanimously held (Rec., p. 49) that such policy involves "merely the exercise of a man's right to do what he will with his own." As a matter of fact it has been the understanding of the Company from the beginning of this proceeding in 1918, and the Chairman of the Commission then so publicly declared, that it is in the

†i. e., original brief.

nature of a friendly test suit designed conclusively to settle the question whether, in the absence of all question of monopoly, the refusal by a manufacturer to sell for either or both of the reasons stated involves the use of an unfair method of competition within the meaning and prohibition of Section 5. This question has long been the subject of dispute between the Commission and manufacturers, the Commission steadfastly adhering to its original opinion that such refusal-to-sell conduct is within its authority to prohibit under that section. We submit, with confidence, that upon the record if an offense against the Act exists at all in the Beech-Nut merchandising policy in issue, it must be found in such essential refusal-to-sell conduct constituting its body, life and value; that if such conduct does not involve, *per se*, the use of an unfair method of competition within the meaning and prohibition of Section 5, where independently effected without any purpose to create or maintain a monopoly, then there is nothing in either the Complaint or the supported Findings which does.

Having defined the essential conduct in issue, it remains to inquire whether it is pursued with a purpose and under circumstances which would unquestionably invalidate its exercise under the Act, guided by the principle that the facts not negatived by either the Complaint or duly supported Findings must be assumed to be true. And it must be concluded that it is not. This is so because: *First: There is no charge or finding by the Commission, in the record, either that the Company pursues the conduct in issue with a purpose to create or maintain, or that such conduct in any way involves, results in, or tends to introduce, unlawful monopoly.* The Commission neither charges nor finds therein that the Company, by reason of such conduct or otherwise, monopolizes, or purposes or

attempts to monopolize interstate commerce in the products affected, that the Company dominates or controls, to any extent, either their production, transportation or distribution. Neither the Complaint, Findings nor Order contains any reference whatever to unlawful monopoly. On the contrary, it is indisputable upon the face of the record, as it is in fact, that the Company produces and merchandises its products in an open and free market, operating at all times at its peril in sharp competition with the manufacturers of similar products, and is always dependent for its business upon the custom of dealers who are under no necessity, obligation or compulsion to buy from it, who are able freely to purchase elsewhere similar products of other origin to the full extent desired. Hence, this case presents no charge or finding of the use of methods of competition potential for or involving unlawful monopoly, in purpose or effect. *Second: There is no charge or finding by the Commission, in the record, either that the Company pursues the conduct in issue with a purpose to effect or enforce, or that such conduct in any way involves, results in or tends to introduce, either an unlawful combination, or an unlawful conspiracy, or an unlawful agreement or understanding, whether express or implied, with its dealer customers unduly to restrain trade in products sold by it and bought by them. Likewise, there is no charge or finding by the Commission, in the record, either that the Company pursues such conduct with the purpose to effect, or that such conduct involves or results in, conditional sales.* Neither the Complaint, Findings nor Order contains any reference whatever, in terms, to unlawful combination ,or unlawful conspiracy, or unlawful understanding or agreement (except as hereafter negatively stated), or unlawful restraint of trade, or conditional sales.

On the contrary, as hitherto pointed out, both the Agreed Statement and the Findings as to the Facts conclude with this pregnant dennitive declaration (Rec., pp. 35, 43): "That the merchandising conduct of respondent, heretofore defined and as herein involved, does not constitute a contract or contracts whereby resale prices are fixed, maintained, and enforced." And the Commission further formally agrees and finds that the Company merely "suggests" resale prices (pp. 31, 38), and always deals with each customer separately (pp. 30, 37). Moreover, it is highly significant that the Complaint originally (p. 25) charged that the Company "requires its purchasers to agree to maintain or resell" at standard prices specified by it and refuses to sell its products to dealers who will not so agree, but was subsequently amended (p. 27) by the Commission, upon its own motion, whereby this charge was wholly withdrawn because concededly without support. Further, in the complete absence of any charge or finding that the conduct in issue in any way involves, either in purpose or in effect, an unlawful combination, or an unlawful conspiracy, or an unlawful agreement or understanding, whether express or implied, and in the presence of the unquestioned fact that it refers solely to the essential refusal-to-sell conduct hithrto defined and now under consideration, the Commissio gains nothing from the word "cooperation" as used in the Agreed Statement. If the Company may lawfully confine its sales to dealers who sell both at the suggested prices and to other dealers who sell at such prices, under the general circumstances here presented, it must follow that such sales conduct of the dealers is also lawful. And it can in no way derogate from the inherently lawful character of the conduct of either the Company or its dealer customers merely to say that they thereby "cooperate," so-called, in the Company's policy, or merely to describe

their sales conduct as "cooperation." (*Frey & Son* v. *The Cudahy Packing Co., supra*). And even if the question were here presented, which it is not, whether an unlawful combination, or conspiracy or agreement, within the prohibition of the Sherman Act, may be legally implied from such essential refusal-to-sell conduct, the answer would have to be in the negative. (*Id.*) Likewise, in the complete absence of any formal charge or finding that the conduct in issue in any way involves, either in purpose or in effect, an unlawful restraint of trade in products sold or a sale subject to an unlawful understanding or condition, and in the presence of the formal admission and finding by the Commission that that conduct does involve, not unlawful restrictive agreements (whether express or implied) whereby resale prices are fixed, maintained and enforced, but the mere suggestion of resale prices and a refusal to sell to dealers who are desired as customers for the reason that they either do not charge such prices or resell to other dealers who do not charge such prices, it is idle for the Commission to assert that the Company, by such refusals to sell, deprives dealers of their right freely to sell what they have bought from the Company and own. Moreover, as a result of the decision by this Court in the *Colgate* case it is conclusive that such a refusal-to-sell conduct, independently effected without any purpose to create or maintain a monopoly, does not involve an undue restraint of trade in products sold, within the prohibition of the Sherman Act, whereby dealers are deprived of their right freely to sell. It is, therefore, indisputable upon the face of the record, as it is in fact, that the Company effects its refusal-to-sell conduct solely in pursuance of its own individual discretion always independently exercised in the normal course of its own individual trade with each dealer, directly and separately. There is no unlawful combination of competing manu-

facturers, there is no unlawful combination of competing dealers, there is no unlawful combination of manufacturer and competing dealers tied together by, and acting in concert through, a system of interlocking restrictive agreements. Likewise, it is indisputable upon the face of the record, as it is in fact, that the essential conduct here in issue is a mere refusal by the owner of movables to sell for a reason, and not a sale subject to a restrictive condition, understanding or agreement, whether express or implied, a mere denial to dealers of the privilege to buy, and not a qualification of their title to and a limitation of their right freely to sell property actually bought, paid for and owned by them, so or otherwise effected. It is incontrovertible, in fact, that all sales made by the Company are unconditional and absolute, that the Company gives and each buyer receives, upon each sale, a full, clear and unqualified title, that each buyer possesses complete and unrestricted liberty of alienation with respect to the property so bought, paid for and owned by him and is wholly free to sell it or not, as he pleases, to whom and at any price he pleases. All that dealers cannot do, so far as the conduct of the Company extends to and affects them, is to buy from the Company unless and until it chooses to sell. And it chooses not to sell for the reasons stated. That is all there is of it. If dealers sell at the suggested prices, they do so in the free exercise of their right to sell, and presumptievly for a reason, if any, satisfactory to them. Hence, this case presents no charge or finding of the use of methods of completion in pursuance of a purpose to introduce or enforce an unlawful combination, or an unlawful conspiracy, or unlawful agreements unduly to restrain trade in products sold, no question of either

the existence or validity of such an unlawful combination, unlawful conspiracy, or unlawful agreements. *Third: There is no charge or finding by the Commission, in the record, that the Company pursues the conduct in issue with a purpose opposed to good morals because characterized by fraud, deception, misrepresentation, bad faith, intimidation, oppression, or some other such wrongful element.* And the Order contains no reference to immoral conduct. *Fourth: There is no charge or finding by the Commission, in the record, that the Company is actuated by malice in pursuing the conduct in issue.* And the Order contains no reference to malice. *Fifth: There is no charge or finding by the Commission, in the record, that the conduct in issue is unlawful either at common law or under some other statute.* And the Order contains no such suggestion. *Sixth: There is no charge or finding by the Commission, in the record, that the products subject to the conduct in issue are other than legitimate articles of trade and commerce, in all respects.* And the Order contains no such suggestion. *Seventh: There is no charge or finding by the Commission, in the record, and there are no facts recited either in the Agreed Statement or the duly supported Findings from which the conclusion could be properly drawn, that the prices suggested by the Company—which prices are not defined therein—are other than entirely fair and reasonable, in all respects, although the right of the Company to refuse to sell its own lawfully possessed property, exercised under the general circumstances here presented, is complete and wholly independent of the character of such prices.* Such refusal-to-sell conduct can no more be condemned under the Trade Commission Act solely because the suggested prices are unreasonable, assuming that fact, than resale-price-fixing contracts can be saved under the Sherman

Act solely because the prices thereby maintained and enforced are reasonable. The only reference to the character of the suggested prices, in the Agreed Statement, is a colorless table (Rec., p. 34) showing the gross and net profit margins received by dealers in the event they elect to resell at such prices, calculated solely upon the basis of a mere estimate of the dealers' cost of doing business, the bare figures of such margins being bluntly set forth without any declaration of their character or supplemental recital of additional facts sufficient to evidence it. It is clear that if the Commission seeks to predicate the Complaint and Order wholly or partially upon the fact of the unfair and unreasonable character of the suggested prices, it must duly establish it, as in the case of any other fact. It cannot be assumed that either such prices or such margins are in any respect excessive, since the presumption is that they are fair and reasonable in all respects. The burden is squarely upon the Commission duly to establish the contrary. This the Commission has wholly failed to do. There is merely an admission that dealers receive the indicated profit margins, so calculated, if they elect to resell at the suggested prices. If the estimate, upon the basis of which the margins are calculated, is wrong, the table falls. It cannot be held that such margins are patently excessive, as they are not. What standard or rule of construction warrants that conclusion? It is obvious that what is an unfair and unreasonable price in merchandising is a delicate and complex question of fact, turning upon many circumstances. And it is a matter of common knowledge and sense that a fair and reasonable profit margin is not a fixed and inflexible figure. There is a spread or range in such a margin until it reaches a maximum, on the one hand, beyond which it is unreasonably high, and a minimum on the other hand, below which it is unfairly low. The deter-

mination of these limitations depends upon due proof. Moreover, the Order makes no reference to and draws no distinction between the character of the suggested prices. The Company is thereby ordered to cease and desist from refusing to sell its products to dealers who either do not charge the suggested prices or resell to other dealers who do not charge such prices, whatever their character may be. The significance and effect of such an extraordinary Order we shall later discuss. Hence, in the complete absence of any proof or admission to the contrary, it must be presumed that the prices in issue are fair and reasonable in all respects. There can be no doubt that the Company is clearly entitled to the full benefit of that presumption, upon the record. Certainly the Company honestly believes that the suggested prices are fair and reasonable in all respects, as the Agreed Statement shows (p. 31), that they are essential to the welfare and prosperity of its own business, and in the best interest of all concerned. They are not arbitrarily named, but represent the result of careful, thorough and conscientious investigation of all the facts involved. It is not to be supposed that the Company, operating at all times at its peril in a highly competitive market and depending for its business upon the favor of buyers who are under no necessity or obligation to buy its products and are able freely to purchase similar products of other origin, would deliberately suggest prices which are either unreasonably high, whereby buying is repulsed, or unfairly low, whereby trade in its products is discouraged and demoralized, and then refuse to sell to dealers who either do not charge such prices or resell to other dealers who do not charge such prices. It must be presumed that the Company, as a successful manufacturer, recognizes and is guided by the obvious fact that it cannot permanently grow and prosper unless the prices charged for its

products, both originally and subsequently, are uniformly fair and reasonable in all respects, and generally recognized as such. And it must be likewise presumed that dealers, generally, are of the opinion that the Company's policy and suggested prices are fair and reasonably and conducive to the welfare of all interested, since otherwise they would not prefer to trade in Beech-Nut products because of that policy. The truth is that the Company effects its refusal-to-sell policy solely for the purpose of safeguarding its own business and of protecting the trade and public, so far as it may lawfully do so, from the injurious detriment which unquestionably flows from the charging of unfair and unreasonable prices for its products The Compay is fully conscious of the fact that it is powerless to restrict the right of dealers who have actually bought and own Beech-Nut products freely to sell them, even at unfair and unreasonable prices. And it only claims for itself the right it concedes to its buyers, to-wit, the right freely to sell its lawfully owned and possessed property, freely to exercise it own independent discretion in selecting its own customers, freely to refuse to sell its own property to dealers who are, in its judgment, undesirable customers because unfair traders. And even if it might be held that the Company is mistaken in such judgment, its right of freedom to trade is not lost merely because poor judgment is used in its exercise. It is pertinent to observe, here, that the Commission finds that the Company refuses to sell to *practically* all, not to all, dealers, who do not charge the suggested prices. And the fact is that the exceptional dealers to whom the Company sells and continues to sell, although they do not charge the suggested prices, are the dealers who sell at lower, *but not at unfairly low,* prices, for any reason. In illustration: the Company customarily sells to that class of dealers who make a practice of selling at true economy

prices, because of a no-service, a cash and carry, method of operation. The no-service dealer is the exception, the service dealer is the rule. Further, it is highly significant that throughout the entire period of the war when this proceeding was instituted and prosecuted, the United States Food Administration did not once criticize or question any of the prices either charged or suggested by the Company, although such prices were at all times subject to its official scrutiny under the authority of a statute (the Food control Act of August 10th, 1917) declaring the charging of excessive prices to be unlawful. *Eighth: There is no charge or finding by the Commission, in the record, that the dealers who sell at the suggested prices and do not sell to other dealers who do not charge such prices are, for that reason, engaged in conduct outlawed by the Act or otherwise. The dealers' conduct is concededly lawful.*

We now have before us the essential conduct herein challenged and sought to be outlawed and prohibited, the purpose and circumstances of its pursuit, and the purpose and circumstances absent from its pursuit, all of which is indisputable in fact. It follows that the fundamental question presented by this cause, conclusive of its decision, is this: May it be reasonably held, in law, that the refusal by the Beech-Nut Packing Company to sell its own products to dealers who are not desired by it as customers for the reason that they either do not charge the prices for Beech-Nut products suggested by it or resell to other dealers who do not charge such prices, effected solely in the normal course of its own private business and individual trade, solely in pursuance of its own individual discretion independently exercised, and always without any purpose either opposed to good morals because characterized by fraud, deception, misrepresentation, bad faith, intimidation, oppression, or some other

such wrongful element, or against public policy because involving the introduction or pursuit of unlawful monopoly, undue restraint of trade in products sold, or conduct otherwise prohibited by law, constitutes the use of an unfair method or unfair methods of competition, substantially detrimental to the interest of the public, in general, and unfairly injurious to the Company's competitors, in particular, within the meaning and prohibition of Section 5 of the Federal Trade Commission Act, when that conduct is examined in the light of the great remedial purpose contemplated by the Act and is tested by the principles of law settled by the adjudged cases, hitherto defined? We respectfully submit that this question manifestly must be answered in the negative, since such refusal-to-sell conduct unquestionably involves but the mere independent assertion by the Company, without any unlawful purpose, of its fundamental common-law right of freedom to trade, which right the Federal Trade Commission Act, supplementing the Sherman Act, was expressly enacted more completely and effectually to preserve and protect, and therefore does not impair or destroy. As heretofore stated, it is clear that, in the absence of any such unlawful purpose, Section 5 does not deprive a manufacturer or trader, engaged in an entirely private business and independently exercising his own individual discretion in the normal course of his own individual trade, of his elementary right freely to select his own customers, freely to sell or decline to sell his lawfully owned and possessed property or not, as he pleases, to whom he pleases, for any reason he pleases, or for no reason if he so pleases. And, of course, he may announce in advance that he will do what he has the lawful right to do. (*United States* v. *Colgate & Co.*, 250 U. S. 300, and cases

cited; *U. S.* v. *A. Schrader's Son, Inc.*, 252 U. S. 85; *Federal Trade Commission* v. *Gratz et al*, 253 U. S. 421; *Frey & Son* v. *Cudahy Packing Company*, 255 U. S.) Likewise, it is indisputable that such refusal-to-sell conduct merely involves the lawful assertion of the right of freedom to trade upheld in the *Colgate* case (*supra*), and does not involve, as the Commission formally admits and finds, the imposition of the unlawful restraint of trade in products sold, effected through restrictive agreements, condemned in the *Miles case* (220 U. S. 373).

The fact is, as we all know, that dealers must always satisfy their manufacturers, or they must go without goods. Whether they shall be able to buy always depend upon the manufacturer's decision, in the absence of a contract creating an obligation to sell. The freedom to which dealers are entitled is precisely that to which manufacturers are entitled, and no more, viz., the freedom to sell the property they own. The freedom of neither the manufacturer nor the dealer extends so as to control the sale of property owned by the other, in the absence of any contractual obligation to sell. To construe Section 5 as requiring the manufacturer to sell against his will to a dealer who seeks to buy, in the absence of a contract obligating the manufacturer to sell, would be to project the will of the dealer so as to cause it to control property not subject to his will because owned by another, and thus to make the will of such dealer unwarrantedly take the place of the law of the land as to such property.

III.

Moreover, Section 5 cannot, consistently with the due process clause of the Fifth Amendment to the Constitution of the United States, be construed and applied to deprive the Beech-Nut Packing Company of its fundamental right so to refuse to sell its own products to dealers who are not desired by it as customers.

It is indisputable that the Order in issue is essentially designated and effective, if enforced, to deprive the Company of the right to refuse to sell its own products to dealers who are not desired by it as customers for the reason that they either do not charge the prices suggested by it or resell to other dealers who do not charge such prices. Hence, the actual and practical effect of the Order, if enforced, is to compel the Company, against its will, to sell its own lawfully possessed private property to others, to whom it is under no contractual or other obligation to sell, for their private use and benefit and to its detriment. We respectfully submit that Section 5, construed to authorize such an Order and applied to enforce it, must be held to be repugnant to the Fifth Amendment to the Constitution of the United States and therefore void, because it thereby deprives the Company of its liberty and property without due process of law. (*Missouri Pacific Railway Co.* v. *Nebraska*, 164 U. S. 403, 417, and cases cited; *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589; *Adair* v. *United States*, 208 U. S. 161, 173, 174-175; *Grenada Lumber Co.* v. *Mississippi*, 217 U. S. 433, 440; *Great Atlantic & Pacific Tea Co.* v. *Cream of Wheat Co.* (D. C.), 224 Fed. 566, 574-575.) The Due Process Clause of the Fifth Amendment but recognizes and declares the great and ancient principles of the common law as to the fundamental rights of the indi-

vidual, and secures them from invasion by the power of the federal government. (*Logan* v. *United States,* 144 U. S. 263, 293; *North Carolina* v. *Vanderford* (D. C.), 35 Fed. 282, 283; *Weimer* v. *Bunbury,* 30 Mich., 201, 214). And one of the great and ancient principles of the common law is the fundamental right of freedom to trade, subject to the limitations necessarily arising out of the equal rights of others and the paramount interest and welfare of the public at large. The fundamental right of the owner of movables freely to sell them or not, as he pleases, and to whom he pleases, is analogous to the fundamental right of the individual freely to sell his labor or not as he pleases, to whom he pleases. The principle was clearly stated by the Court, speaking through Mr. Justice Harlan, in the leading *Adair* case (*supra,* pp. 173, 174-175):

> "Mr. Cooley, in his treatise on Torts, p. 278, well says: 'It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice or malice. With his reasons neither the public nor third persons have any legal concern. * * *'
>
> "While, as already suggested, the rights of liberty and property guaranteed by the Constitution against deprivation without due process of law, is subject to such reasonable restraints as the common good or the general welfare may require, it is not within the functions of government—at least in the absence of contract between the parties—to compel any person in the course of his business and against his will to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another. The right of a person to sell his labor upon such terms as he

deems proper, is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions under which he will accept such labor from the person offering to sell it. So the right of the employe to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employe."

Other pertinent expressions are:

"That any one of the persons engaged in the retail lumber business might have made a fixed rule of conduct not to buy his stock from a producer or wholesaler who should sell to consumers in competition with himself, is plain. No law which would infringe his freedom of contract in that particular would stand." (*Grenada Lumber Co.* v. *Mississippi*, 217 U. S., 433, 440.)

"Numerous individuals and corporations have been enjoined from restraining the trade of other people, no matter how flourishing the offenders' trade might be, nor how generally the general volume of trade had increased during the period of restraint. But never before has it been urged that, if J. S. made enough of anything to supply both Doe and Roe, and sold it all to Doe, refusing even to bargain with Roe, for any reason or no reason, such conduct gave Roe a cause of action. If Congress has sought to give him one, the gift is invalid, because the statute takes from one person for the private use of another the first person's private property. * * * If a man prefers to keep what he has, an offer of money to salve the taking thereof does not prevent such taking from being confiscation. The Cream of Wheat Company is a purely private concern, except as regulated by its creating law. It is an ordinary merchant, whose business is affected by no public use whatever. The statute as construed by plaintiff descends upon that private merchant,

and commands him to make a contract by which he transfers his property for a price, but against his will. The contract and the price are legally mere surplusage; the constitutional violation lies in the compulsion whereby he is deprived of his property for a private purpose. * * * but neither the nation nor any individual can take away its property, with or without compensation, for the private use of anyone." (Judge Hough, *Great Atlantic & Pacific Tea Company* v. *Cream of Wheat Company* (D. C.), 224 Fed., 566, 574-575.)

"The taking by a State of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States." (*Missouri Pacific Railway* v. *Nebraska*, 164 U. S., 403, 417, and cases cited.)

IV.

Finally, the charge and conclusion by the Commission that the Company's refusal-to-sell policy here in issue is detrimental to the interest of the public, in general, and unfairly injurious to its competitors, in particular. and therefore within the prohibition of Section 5, upon the grounds formally declared in the Complaint and Findings, are wholly without support either in fact or law.

The grounds upon which the Commission formally rests its charge and conclusion that the merchandising policy in issue is detrimental to the interest of the public, in general, and unfairly injurious to the Company's competitors, in particular, and therefore within the prohibition of Section 5, are plainly declared in the Complaint and Findings as to the Facts. An analysis of such grounds plainly establishes, however that the Commission's charge and conclusion predicated upon them are wholly without support either in fact or law.

(a) *The Commission's Charge And Conclusion That The Company's Refusal-To-Sell Policy Is Unfairly Injurious To Its Competitors, Upon The Grounds Formally Declared, Are Wholly Without Support Either In Fact Or Law.*

The Commission formally charges (Rec., p. 27) and finds (p. 42) that the refusal-to-sell policy in issue is unfairly injurious to the Company's competitors, because the Company pursues it with the purpose and effect of securing the trade of dealers and enlisting their active support and cooperation in enlarging the sale of Beech-Nut products, to the prejudice of its competitors who do not likewise pursue this policy. The Commission also finds (id.) that such policy has the further effect of

tending to force competing manufacturers who do not pursue it to adopt it in order to offset the "preference" of dealers for Beech-Nut products because of it, thus enabling them to compete upon more equal terms with the Company. Turning now to the Agreed Statement, defining all the facts actually in issue, we find that the only reference therein to the affect of the Company's policy upon competitors is this (pp. 33-34): wholesale dealers generaly "prefer" to handle and push Beech-Nut products, because of the Company's refusal-to-sell policy, rather than the products of competing manufacturers who do not pursue it. This declaration is repeated in the Findings (p. 40).

We reply:

First: The finding that the Company's refusal-to-sell policy has the effect of tending to force competing manufacturers who do not pursue it to adopt it, etc., is wholly without support in the Agreed Statement, as is wholly without support in the Agreed Statement, as it is wholly such a consequence. Moreover, even if it might be held that this finding is supported by the Agreed Statement, it is that the effect of the Company's policy is a tendency resulting in a benefit, not a detriment, to its competitors, because they are thereby lead to adopt a policy which enables them to compete upon more equal terms, and thus more successfully, with the Company.

Second: Even if we concede the charge and finding that the Company pursues its refusal-to-sell policy with the purpose and effect of securing the trade of dealers and enlisting their active *merchandising* support and cooperation in enlarging the sale of Beech-Nut products, wherefore its competitors are prejudiced by some loss

of custom, where is there anything legally unfair in that policy? Every manufacturer engaged in a competitive business must, if he is to succeed, and customarily does, in the normal every-day course of trade and commerce, precisely what the Commission so charges and finds, to wit, he pursues own merchandising policy with the purpose and effect of securing the trade of dealers and enlisting their active merchandising support and cooperation in enlarging the sale of his products, wherefore his competitors are necessarily bound to be prejudiced by a greater or less loss of custom. What the Commission challenges here is *competition*, and not an unfair method of competition. What the Commission complains against here is the loss of custom which must always be the inevitable consequence of successful competition, and not an injury flowing from the use of an unfair method of competition. Competition necessarily involves rivalry between two or more traders of the same class to secure the same thing, viz., the custom and patronage of the buying public. The success of one trader inevitably results in some loss of custom by another and competing trader. Loss of custom, however, due alone to mere competition, does not either constitute an actionable injury under the common law or afford a basis for a proceeding under Section 5. The right lawfully to trade and compete in business is a perfect defense against any charge that such injury was inflicted wantonly or without cause.

Third: The true effect of the Company's refusal-to sell policy, insofar as its competitors are concerned, is, in fact, no more than that plainly found, to-wit, wholesale dealers generally "prefer" to trade in and push the sale of Beech-Nut products, because of the Company's policy, rather than the products of competing manufacturers who do not pursue it. There is no finding whether the number of competing manufacturers who do not pursue

such a policy is relatively large or relatively small. There is no finding that they suffer any loss of custom by reason of such "preference" by dealers. It may be reasonably assumed, in absence of any finding to the contrary, that they meet and overcome such personal "preference" by dealers by creating a sufficient insistent consumer demand for their products, which is a fact. Neither is there any finding that they have ever complained either to the Commission or to the Company that its policy has been, is, or may become injuriously unfair to them. Certainly the Company has never heard of such a complaint. And if the Commission had received one it would have unquestionably so found. The presumption is, therefore, upon the face of the record in this cause, that competing manufacturers have not hitherto conceived this policy to be in any respect unfairly injurious to them and complained against its use, which is the fact. Moreover, "preference" by dealers for Beech-Nut products legally imports the free and independent exercise by them of their own individual discretion. Presumptively that "preference" is governed by a reason satisfactory to them and is made in their own interest, as they view it, since they are under no obligation or necessity to buy or favor Beech-Nut products. And there is no charge or finding by the Commission that the dealers in Beech-Nut products are engaged in unlawful conduct in so "preferring" to trade in and favor such products. Unquestionably dealers have the clear right to buy from any manufacturer they please, if the manufacturer chooses to sell. Likewise they have the clear right freely to exercise their own independent discretion as to the products they will buy, when offered for sale, and having bought, they have the clear right freely to exercise their own independent discretion in the sale of the products they own. Unquestionably a manufac-

turer can have no reasonable ground for complaint either against a competing manufacturer or against dealers because the latter, in the free and independent exercise of their own individual discretion, prefer to trade in and push the sale of such competing manufacturer's products rather than his own, for any reason satisfactory to them or for no reason at all, since such lack or loss of custom is due alone to mere competition, to the mere exercise by dealers of their fundamental right to trade. Hence, competing manufacturers have no reasonable ground for complaint against the Company merely because dealers prefer to trade in and favor Beech-Nut products. This cause manifestly presents only the normal and lawful conduct of buyers and sellers, only the normal and lawful relationship which customarily exists between buyers and sellers and between traders of the same class who are all operating under a highly competitive system. There is involved no more than the normal and inevitable working of the processes of competition and freedom of trade. And under a state of society where the right of freedom to trade is the law of the land manufacturers must always depend upon the decision of dealers as to whether they shall be able to sell, dealers must always depend upon the decision of manufacturers as to whether they shall be able to buy, and both manufacturers and dealers may freely exercise their rights essentially incident to ownership, in pursuance of their own independent discretion and in the absence of any unlawful purpose. The Company is under no legal obligation to make or sell. Its competitors are under no legal obligation to make or sell. The dealers are under no legal obligation to buy or sell. Neither the Company nor its competitors can compel dealers to buy or can restrain their right of freedom to sell what they have bought and own. Neither the dealers nor the Company can compel competing

manufacturers to sell or impose any restraint upon their right of freedom to sell. Neither the dealers nor competing manufacturers can compel the Company to sell or impose any restraint upon its right of freedom to sell. Finally, we direct the attention of the Court to the highly significant fact that nowhere in its brief does the Commission show, or attempt to show, how and why the Company's refusal-to-sell policy is unfairly injurious to its competitors, either in purpose or in effect. The reason of this fatal omission is of course, plain—it cannot do so.

(b) *Likewise, The Commission's Charge And Conclusion That The Company's Refusal-To-Sell Policy Is Detrimental To The Interest Of The Public, In General, Upon The Grounds Formally Declared, Are Wholly Without Support Either In Fact Or Law.*

The Commission formally charges (Rec., p. 27) and finds (pp. 37-38, 42-43), in substance, that the Company's refusal-to-sell policy in issue is detrimental to the public interest, because it constitutes a system to fix, maintain and enforce resale prices pursued with the purpose and effect of depriving dealers of their right freely to sell the Beech-Nut products bought and owned by them and preventing them from reselling such products either at lower prices or to other dealers who resell at lower prices, wherefore competition in price in the resale of Beech-Nut products is eliminated, the relatively lower cost and more efficient dealers are prevented from reselling such products at lower prices adequate and warranted by their lower cost and greater selling efficiency, the relatively higher cost and less efficient dealers are protected against the competition of

the relatively lower cost and more efficient dealers, and the public is compelled to pay enhanced prices for Beech-Nut products. It is also found (pp. 42-43) that the Company's policy has the effect of tending to force competing manufacturers who do not pursue it to adopt it in order to offset the "preference" of dealers for Beech-Nut products because of it, thus enabling them to compete upon more equal terms with the Company and thereby tending to compel the public to pay enhanced prices for their products. It is further found (p. 42) that the gross profit margins estimated to be received by dealers in reselling at the suggested prices (*vide* p. 30) are so adjusted as to induce a large number of dealers to handle Beech-Nut products, that such margins are greater than necessary to enable the relatively lower cost and more efficient dealers to resell such products and make a profit.

We reply:

First: The Finding that the Company's policy has the effect of tending to force competing manufacturers who do not pursue it to adopt it, etc., is, as previously stated, wholly without support in the Agreed Statement, as it is wholly without support in actual fact. Hence, the dependent finding that the public, because of such effect, is compelled to pay enhanced prices for the products of such competing manufacturers is likewise wholly without support in fact.

Second: The finding that the gross profit margins estimated to be received by dealers in reselling at the suggested prices are so adjusted as to induce a large number of dealers to handle Beech-Nut products is wholly without derogatory significance. Suppose they are, where is the vice? The Commission formally ad-

mits and finds that the prices are merely "suggested" (pp. 31, 38), that the indicated gross profit margins received by dealers in the event they elect to resell at such prices are merely "estimated" (pp. 34, 41). The Commission does not charge or find that either such prices or such profit margins are in any respect other than fair and reasonable.

Third: The finding that such gross profit margins are greater than necessary to enable the relatively lower cost and more efficient dealers to resell Beech-Nut products and make a profit is likewise wholly without derogatory significance, since it is not found that they are greater than necessary to enable such dealers to resell Beech-Nut products and make a *fair and reasonable profit.* And, in the complete absence of any proof or finding to the contrary, the presumption is that they are not. We have hitherto conclusively established (*vide* p. 29) that there is nothing recited in either the Agreed Statement or the Findings duly supported thereby from which it could be properly concluded that the suggested prices are other than fair and reasonable in all respects, as they are not, in actual fact.

Fourth: There remain the basic charge and finding upon which the Commission's conclusion of unlawful conduct detrimental to the public interest ultimately pivots and rests, to-wit: The Company's refusal-to-sell policy constitutes a system to fix, maintain and enforce resale prices pursued with the purpose and effect of depriving dealers of their right freely to sell the Beech-Nut products bought and owned by them and preventing them from reselling such products either at lower prices or to other dealers who resell at lower prices, wherefore, etc. We respectfully submit that such charge and

finding are obviously and unquestionably wholly without support, either in fact or law, because:

(1) The Commission formally admits and finds (Rec., pp. 31, 38) that the Company merely "suggests" resale prices. The Commission formally admits and finds (*id.*) that the Company merely announces that it will refuse to sell, and subsequently does refuse to sell, its own products to dealers who are not desired by it as customers for the reason that they either do not charge such prices or resell to other dealers who do not charge such prices. The Commission formally admits and finds (pp. 35, 43) that the conduct in issue does not involve contracts (whether express or implied) whereby resale prices are fixed, maintained and enforced. The Commission amended the Complaint (p. 27), upon its own motion, to eliminate the charge of agreements originally contained therein. And in the complete absence of any formal charge or finding to the contrary, it must be presumed that such conduct is wholly free from either conditional sales or any unlawful combination, conspiracy or agreement unduly to restrain trade in products sold, either in purpose or in effect. Moreover, the Order is, in terms, essentially designed and effective, if enforced, to deprive the Company of the right to refuse to sell its own products to dealers who are not desired by it as customers for the reason above stated. Hence, as hitherto pointed out, it is indisputable upon the very face of the Agreed Statement, duly supported Findings, and Order, as it is in fact, that the essential conduct in issue and sought to be outlawed and prohibited is a mere refusal by the Company to sell its own products to dealers who are not desired by it as customers for a reason, and not a sale of such products by the Company subject to a

restrictive condition, agreement or understanding, whether express or implied, a mere denial by the Company to dealers of the privilege to buy its own lawfully possessed property, and not a qualification by the Company of their right freely to sell Beech-Nut products actually bought and owned by them, so or otherwise effected. It is indisputable upon the face of the record in this cause, as it is in fact, that all sales made by the Company are unconditional and absolute, that the Company gives and each buyer receives, upon each sale, a full, clear and unqualified title, that each buyer possesses complete and unrestricted liberty of alienation with respect to the property so bought, paid for and owned by him and is wholly free to sell it or not, as he pleases, to whom and at any price he pleases, that all dealers cannot do, so far as the conduct of the Company extends to and affects them, is to buy from the Company unless and until it chooses to sell, and it chooses not to sell for the reason stated. That is all there is of it. Further, the Commission formally admits and finds (pp. 31, 38) that the Company refuses to sell, not to all, but to *practically* all dealers who do not charge the suggested prices. And the fact is, as previously stated, that the exceptional dealers to whom the Company sells, has always sold, and continues to sell, although they do not charge the suggested prices, are the dealers who sell at lower, *but not at unfairly low* prices, for any reason.

(2) The *Colgate* case (*supra*) is decisive of the conclusion that such essential refusal-to-sell conduct does not involve an undue restraint of trade, either in purpose or effect, within the prohibition of the Sherman Act, if, as here, independently pursued without any purpose to create or maintain a monopoly, that such conduct, on

the contrary, merely involves the lawful exercise by the manufacturer of his fundamental common law right of freedom to trade which the Sherman Act was enacted to preserve. And the Federal Trade Commission Act was expressly enacted to supplement the Sherman Act and thus more completely and effectually to safeguard the right preserved by that Act. It is too plain for argument that if the refusal-to-sell conduct presented by the *Colgate* case cannot be reasonably held legally to involve an undue and unlawful restraint of trade in products sold, then it must likewise be concluded that the essentially similar refusal-to-sell conduct presented here cannot be reasonably held legally to involve an undue and unlawful restraint of trade in products sold.

(3) If the Company's refusal-to-sell policy is inherently lawful, as it is, it does not become unlawful merely because it is "systematically" pursued. The Company has the clear right "systematically" to do what it has the lawful right to do. Hence, it in no way derogates from the otherwise inherently lawful character of such policy to charge and find that it is "systematically" effected.

(4) Public policy manifestly supports the refusal by a private manufacturer to sell his own lawfully possessed property under the circumstances defined, because such refusal, as stated, merely involves the lawful assertion of a fundamental right which it is the public policy, expressed and enforced by the anti-trust laws, to preserve and protect. Moreover, sound public policy supports and justifies such refusal by a manufacturer to sell to dealers who, in his honest judgment, charge unfair prices, because such refusal is a reasonable exercise of the right of freedom to trade. The fact that the manufacturer may be honestly mistaken in his judgment neither de-

rogates from the entire legality of his conduct nor renders it any the less reasonable. Will it reasonably be said that a manufacturer is not justified in declining sales to any dealer whose merchandising practices are, in his best judgment, detrimental to his own business, to the trade and to the consuming public at large? Will it reasonably be held that he is not justified in declining sales to dealers whose stores are unsanitary, whose advertisemets are fraudulent, whose prices are either excessively high or unfairly low, or whose selling methods, are, in any respect, improper, inefficient or detrimental? Will it reasonably be maintained that a manufacturer has passed beyond the bounds of proper and lawful conduct in merely declining to sell, in entire good faith, to his detriment? For be it always remembered that manufacturers are in business to sell, not refuse to sell. Their ultimate objective is to effect maximum sales, to effect maximum distribution. No manufacturer declines to sell, in the normal course of trade, except where he is convinced that to sell would be detrimental rather than beneficial. And so long as the manufacturer acts independently and without any unlawful purpose as here, his discretion as to whether or not he will sell is complete. It is obvious that the interest of the manufacturer of an article definitely identified in the public mind by trademark, brand or name—such as the Beech-Nut Packing Company, the maker of the well-known Beech-Nut Brand of food products—does not cease with his own sale, with the mere formality of the transfer of title to the physical article to the buyer. He has a real, vital and continuing interest in the manner and method of the subsequent sale, disposition or use of such article during the course of distribution and until it reaches the consumer. When the manufacturer sends his identified article out into the channels of trade, its reputation and fair name are com-

mitted to the keeping and are placed at the mercy of the dealers who distribute it. And any action by such distributing dealers which reflects upon, injuries or slanders the favorable reputation and fair name of such article whereby other dealers or the consumers are prejudiced against it and influenced against its further purchase, is a matter of the most serious consequence to the manufacturer. The intangible property right of the manufacturer in his trade-mark, a right recognized and protected by law against infringement, and the good-will value represented by such trade-mark, created by years of hard, patient and expensive effort, sustained hight quality of product, and uniform fair dealing, whereby articles bearing that trademark are widely and favorably known and generally sought and used, constitute his most precious and valuable possession, a possession far more valuable than the tangible assets of his business. The Trade Commission has fully recognized this continuing interest. Commissioner William B. Colver said: "The Commission has recognized that the manufacturer of an identified product has a very real interest in its disposition even after it has parted legal title." (*Address delivered before the American Specialty Manufacturers' Association, at Atlantic City, November* 21, 1919.) A dealer can do no greater injury to the reputation and fair name of such identified article than to charge a price therefor which is so unreasonably excessive as to be immoral and unlawful, as to repel buying, or is so unfairly low as to demoralize trade therein, make it unprofitable and undesirable for other dealers to handle it and influence dealers generally to drop it from the stock. Fair resale prices are absolutely essential to the continued successful sale of such an article. It is not necessary to dwell upon or emphasize the injury to the manufacturer and to the consumer that follows the charging of an unreason-

ably excessive price for such an article by the dealer or to prove that the practice of charging such an exorbitant price repulses purchases and prejudices the consumer against the article. With respect to the detriment of unfair price cutting we need only to quote the words of the Trade Commission: "The consuming public does not enjoy benefits by unfair price cutting to compensate it for the injuries following demoralization caused by price cutting. This for the reason that in the long run, unrestrained price cutting tends to impair if not to destroy, the production and distribution of articles desirable to the public. * * * Unrestrained price cutting is not in the public interest." (*Special Report by the Federal Trade Commission to Congress re resale price maintenance*, 1919.) As District Judge Waddill said in the *Colgate* case:

> "It cannot be said that the defendant has no interest in the prices at which its goods shall be sold. On the contrary, it had a vital interest, in so far as cutting the same would tend to demoralize the trade, and might have been more injuriously affected by the result of this disorganization than the public would be benefited by a temporary reduction in the prices of its products. The sale of the defendant's particular soaps cannot be said to be a necessity, or that the same bears a large proportion to the entire manufacture of soaps of kind and grade involved. The successful prosecution of the defendant's business, and the continued use of its soap by the public, depend upon its ability to find and maintain a market for its output. Price cutting would almost inevitably result in reducing the defendant's business in a given community to only those engaged in that practice, and deprive it of the patronage of the great body of wholesalers and retailers engaged in what they believed to be a fair and legitimate conduct of their business. It by no means follows that, in the end,

> the public would be benefited, as price cutter could easily raise prices after the demoralization caused by his conduct had been brought about, and profit individually by so doing. What the public is interested in is that only reasonable and fair prices shall be charged for what it buys, and it is not claimed that the defendant's manner of conducting its business has otherwise resulted." (*United States* v. *Colgate & Company* (D. C.), 253 Fed., 522, 527.)

Further, sound policy supports the *bona fide suggestion* by the manufacturer of resale prices which are, in his honest and deliberate judgment, fair and reasonable, *solely for the information and education of dealers,* in order that they may not unknowingly resell at a price which is either unreasonably high or unfairly low, *solely for the information and guidance of the consuming public,* in order that it may not unwittingly pay an exhorbitant price for the article of his manufacture, which prices are not arbitrarily named but suggested only after a most careful, thorough and intelligent investigation of all the facts involved. Of course, if dealers prefer to ignore such suggested prices and to resell the article purchased from the manufacturer and owned by them at another price, the manufacturer has nothing to say and can have nothing to say, since he imposes and can impose no restraint whatever upon the right and freedom of alienation of his buyers. The manufacturer can, however, refuse to make further sales to such dealers. It is trite to say that a fair profit is essential to a successful and sound business, that no dealer can definitely continue in business unless he uniformly makes a living and fair profit above his total expense. The fact is that many retailers do not know their costs and thereby unknowingly sell at a price which returns no profit or entails a loss. As the

Trade Commission has said: "The Federal Trade Commission has found that the majority of retail merchants do not know accurately the cost of conducting their business and for this reason they are unable to price their goods intelligently. There must be a decided improvement in this direction *before competition can be placed upon a sound basis* and before we can expect a decrease in the heavy business death rate among retail merchants." (*House Doc. No.* 1355, 64*th Cong., 1st Sess.*) (Italics ours.) The public is vitally interested in a sound, fair and successful conduct of their business by dealers. Likewise, the manufacturer is vitally interested in the charging of fair and reasonable prices for the articles of his manufacture by dealers.

(5) The Company is forbidden, in substance, to refuse to sell to dealers who either do not charge the prices suggested by it or resell to other dealers who do not charge such prices, whatever may be their character. Let us assume, as the order permits us to assume and the fact is, that the suggested prices are fair and reasonable in all respects. What is the result, The Company cannot lawfully decline to sell to dealers who either charge other and unfair or unreasonable prices or resell to dealers who charge prices of that character. That is, the Company must, under the direct compulsion of a government order, sell to dealers who practice unfair price cutting. Yet the Commission, as we have previously seen, has officially reported to Congress that such unfair price cutting is not in the public interest, that it injuriously demoralizes trade, in the long run, it tends to impair, if not to restroy the production and distribution of the articles subject to it, articles desirable to the public. Thus, under the guise of preventing the use of unfair methods of competition in order to preserve free and fair competition and to secure the fundamental right of freedom to

trade, the Commission seeks to compel this private manufacturer, against its will, to sell its own lawfully possessed private property to its conceded detriment and possible ruin, to sell to the conceded detriment of the trade and consuming public, to sell to dealers who are concededly unfair traders and are concededly engaging in an unfair method of competition. Thus the Commission, in effect, commands this private manufacturer to hand over its own property to commercial pirates upon their demand and tender of the price, for their injurious and destructive abuse.

We ask: Can it reasonably be said that a manufacturer who merely suggests fair and reasonable resale prices for the consideration of dealers and announces that he will refuse to sell to all dealers who charge other and unfair and unreasonable prices, and does so refuse to sell, upon occasion, is guilty of using an unfair and unlawful method of competition because dealers, who are under no obligation whatever to resell at such suggested prices, recognizing their inherently fair and reasonable character and realizing that fair and reasonable prices are essential in the best interest of the trade, industry and public at large, voluntarily elect to use them, whereas, if such dealers elect to ignore such prices, as they have a perfect right and are entirely free to do, and to charge other and unfair and unreasonable prices, the manufacturer is then using a fair and lawful method of competition? In other words, if the conduct of the dealers is fair, then the conduct of the manufacturer becomes unfair and unlawful, whereas, if the conduct of the dealers is unfair, then the conduct of the manufacturer becomes fair and lawful. This is precisely the logic upon which this order is based, since the essential ingredient of the alleged offense is the fact that dealers do resell at the suggested prices. Can it be imagined that the Commis-

sion would have instituted this proceeding if dealers generally had ignored such prices? The fallacy of this logic is obvious. It wholly disregards the basic and controlling fact that both the manufacturer and dealers are only doing what they have a clear and undoubted right to do. The manufacturer is merely independently exercising his fundamental right of freedom to trade, without any unlawful purpose and without imposing any unlawful restraint upon the right of freedom of future alienation, by restrictive condition or agreement (express or implied), in the case of sales actually made. Each dealer is likewise but independently exercising his fundamental right of freedom to trade, without any unlawful purpose.

V.

The Commission's Brief.

The Commission has filed two briefs in this cause. Its original brief is analyzed and answered on pages 118-163 of the Company's main brief, to which the attention of the Court is respectfully directed. We will now concisely analyze and answer the Commission's argument in its revised brief†.

The Commission makes two fundamental points, to wit:

First: The facts stipulated by the Company and found by the Commission clearly show that there was a tacit or implied agreement or understanding between the Company and its dealers to eliminate all price competition in the resale of its products, amounting to an unlawful combination in restraint of trade in violation of the Sherman Antitrust Law, and therefore costituting an unfair method of competition within the meaning and prohibition of Section 5. (*Commission's Brief*, pp. 15, 31, etc.) We reply: This cause does not present the question either of the existence or the validity of a tacit or implied agreement or understanding between the Company and its dealers relating to resale prices. Likewise, it does not present the question either of the existence or the validity of an actual combination in restraint of trade. The Complaint defines the sole charge in issue, which charge alone the Company is required to meet in this proceeding. The Findings

†We crave the indulgence of the Court in this summary analysis and answer, due to the fact that the Commission's revised brief was not delivered to Counsel for the Company until the morning of November 7, 1921, the day set for argument, wherefore the time available was not sufficient for a detailed reply.

as to the Facts, to the extent they are supported by the Agreed Statement of Facts, define all the facts actually in issue. And the pertinent facts which are not negatived by either the Complaint or the Findings must be presumed to be true in this proceeding. There is no charge by the Commission in the Complaint and there is no finding by the Commission in the Findings as to the Facts that the conduct in issue involves, in fact, monopoly, that such conduct involves, in fact, contracts or agreements of any kind, whether express or implied, between the Company and its dealers, to fix, maintain and enforce resale prices, that such conduct involves, in fact, a tacit or implied agreement or understanding between the Company and its dealers to eliminate price competition in the resale of its products, that such conduct involves, in fact, sales subject to a restrictive condition, whether express or implied, that such conduct involves, in fact, concerted action between the Company and its dealers, that such conduct involves, either in purpose or effect, an unlawful combination, or an unlawful conspiracy, or an unlawful agreement unduly to restrain trade in products sold by the Company and bought by its dealers, within the prohibition of the Sherman Antitrust Law. And in the complete absence of any such charge or finding, the contrary must be presumed. The Company is entitled to the full benefit of that presumption here. Moreover, the Commission formally admits that the conduct in issue does not involve an agreement of any kind, whether express or implied, with its dealers, to fix, maintain and enforce resale prices, because, upon its own motion, it amended the Complaint entirely to strike out the charge of such an agreement originally contained therein. Further, the Commission formally admits and finds that such con-

duct does not involve contracts (presumptively, in the absence of any finding to the contrary, either express or implied) whereby resale prices are fixed, maintained and enforced. The Commission also formally admits and finds that the Company merely "suggests", not "fixes", resale prices, that the Company merely announces that it will refuse to sell its own products to dealers who are not desired by it as customers for the reason that they either do not charge the suggested prices or resell to other dealers who do not charge such prices. In short, by either formal admission and finding or by failure of formal charge and finding, the Commission has, by its own act, taken out of this cause any question or suggestion of the existence or validity of an actual combination in restraint of trade, any question or suggestion of the existence or validity of a tacit or implied agreement or understanding between the Company and its dealers to eliminate price competition in the resale of its products. Whether the facts in issue might be reasonably held sufficient to establish an unlawful combination within the prohibition of the Sherman Antitrust Law, in the presence of a formal charge and finding of such a combination, is a question not presented here. It is indisputable upon the face of the record herein that the essential conduct in issue is a mere independent refusal by the Company to sell its own products to dealers who are not desired by it as customers for a reason, and not a sale of such products by the Company subject to a restrictive understanding, agreement or condition, whether express or implied, a mere denial by the Company to dealers of the privilege to buy its own lawfully possessed property, and not a qualification by the Company of their title to and a limitation by the Company of their right

freely to sell the property actually bought and owned by them.

Second: Assuming that the facts stipulated by the Company and found by the Commission do not involve a tacit or implied agreement or understanding between the Company and its dealers to eliminate price competition in the resale of its products, nevertheless the conduct in issue is an unfair method of competition within the meaning and prohibition of Section 5, because it has a dangerous tendency unduly to hinder competition. (*Commission's Brief*, pp. 15, 45, etc.) We reply: (1) The Commission neither charges in the Complaint nor finds in the Findings as to the Facts that the conduct in issue is effected *with any purpose to introduce or pursue* either an unlawful monopoly or an unlawful combination, conspiracy or agreement unduly to restrain trade in violation of the Sherman Antitrust Law. In the complete absence of such a charge and finding it must be presumed that the conduct in issue is NOT effected with such a purpose. And, as above noted, the Commission formally admits and finds that such conduct does not involve either contracts or agreements, whether express or implied, to fix, maintain and enforce resale prices, whereby dealers are deprived of their right freely to sell the property bought and owned by them. (2) In the complete absence of any question of the presence, either in purpose or in effect, of sales subject to a restrictive understanding, agreement or condition, whether express or implied, it cannot be reasonably held that the refusal by a manufacturer to sell his own products to dealers who are not desired by him as customers for the reason that they either do not charge the prices suggested by him or resell to other dealers who do not charge such prices, effected in pur-

suance of his own individual discretion independently exercised without any purpose to create or maintain a monopoly, whereby he confines the sale of his products to dealers who resell at the suggested prices and to other dealers who charge such prices, involves a dangerous tendency unduly to hinder competition, because he is thereby but lawfully asserting his elementary right freely to select his own customers, his fundamental common law right of freedom to trade which the Sherman Act was enacted to preserve and the Federal Trade Commission Act, supplementing the Sherman Act, was enacted more completely and effectually to secure. (*United States* v. *Colgate & Co.*, 250 U. S., 300; *Federal Trade Commission* v. *Gratz et al.*, 253 U. S. 421). And, of course, he may announce in advance that he will do what he has a lawful right to do. (*United States* v. *Colgate & Co., supra*). Inasmuch as the essential conduct here in issue is but such refusal-to-sell conduct, it cannot be held to have a dangerous tendency unduly to hinder competition. To construe Section 5 as authorizing and empowering the Commission to prohibit such refusal-to-sell conduct would plainly result not in preserving the right of freedom to trade, but in destroying it. It is repugnant to both the genius and spirit of our institutions and the public policy embodied in the anti-trust laws, to deny to a manufacturer or trader, engaged in an entirely private business and independently exercising his own discretion without any purpose to introduce or pursue unlawful monopoly or an unlawful combination, conspiracy or agreement unduly to restrain trade, the right freely to select his own customers for any or no reason. (3) The specific grounds upon which the Commission formally rests its charge and conclusion that the conduct in issue is detrimental to the

interest of the public, in general, and unfairly injurious to the Company's competitors, in particular, and therefore within the prohibition of Section 5, are declared in the Complaint and Findings as to the Facts. An analysis of such grounds plainly establishes, however, as we have previously shown, that the Commission's charge and conclusion predicated thereon are wholly without support either in fact or law. (See Point IV.).

The balance of the Commission's brief is essentially that contained in its original brief, hence we respectfully direct the attention of the Court to the analysis of it on pages 118-163 of the Company's main brief.

CONCLUSION.

There is no principle of the common law which compels the Beech-Nut Packing Company to sell against its will; neither the Trade Commission Act nor any other federal statute compels the Company to sell against its will; there is no federal statute which denies to the Company the right to refuse to sell its own products for the particular reason stated, under the general circumstances presented; there is no principle of the common law which makes the ground of its refusal a destruction of its right of refusal, when independently asserted without any unlawful purpose; the Company is under no contractual obligation to sell. Hence, the Company is under no legal obligation whatever to sell. And Section 5 cannot, consistently with the due process clause of the Fifth Amendment, be construed and applied to compel the Company to sell against its will. We have not, as yet, reached the stage where a manufacturer or trader, engaged in an entirely private business, is only permitted to sell to customers selected for him by the Government.

It follows that the Order in issue is wholly void because of want of authority and power to make it and therefore must be set aside, that the judgment of the Circuit Court of Appeals for the Second Circuit setting aside such order should be affirmed.

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